

KF

720

C65

CORNELL UNIVERSITY LAW LIBRARY

The Moak Collection

PURCHASED FOR

The School of Law of Cornell University

And Presented February 14, 1893

IN MEMORY OF

JUDGE DOUGLASS BOARDMAN

FIRST DEAN OF THE SCHOOL

By his Wife and Daughter

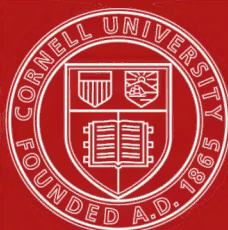
A. M. BOARDMAN and ELLEN D. WILLIAMS

Cornell University Library
KF 720.C65

A practical treatise on the law of reple



3 1924 018 822 209



Cornell University Library

The original of this book is in
the Cornell University Library.

There are no known copyright restrictions in
the United States on the use of the text.

A PRACTICAL TREATISE
ON THE
LAW OF REPLEVIN

AS ADMINISTERED BY THE
COURTS OF THE UNITED STATES.

ARRANGED IN THREE PARTS TO FACILITATE
READY REFERENCE.

BY
J. E. COBBEY, B.S., LL.B.

CHICAGO:
CALLAGHAN AND COMPANY,
1890.

Mp82

COPYRIGHT 1890

BY

J. E. COBBEY.

(ALL RIGHTS RESERVED.)

TO MY PARENTS,

WHOSE ECONOMY AND SACRIFICES ENABLED ME TO ACQUIRE THE
EDUCATION WHICH MADE THIS WORK POSSIBLE, IT IS RE-
SPECTFULLY INSCRIBED BY

THE AUTHOR.

PREFACE.

The first work on replevin was by Gilbert in 1756; followed by Wilkinson in 1825; and by Morris in 1849, which passed through several editions, all of which have long been out of print. These were followed by Wells in 1880, each work being an improvement on its predecessor. As the use of the writ has been greatly enlarged and extended, and the value of personal property has greatly increased in late years, there is a demand for a more recent, comprehensive, and exhaustive treatise on this subject. What here follows is the result of an earnest endeavor to make a reliable, useful, and comprehensive statement of the law of replevin, not only in its general, but special forms. How far this effort has been successful those who use the book can alone determine.

The writer does not claim that his work is without error, but throws himself upon the indulgence of the members of this learned profession in hopes that they will deal lightly with his errors and short comings, and credit him with an honest and diligent endeavor to elucidate a subject by no means free from doubt and difficulties.

Remembering that, while in the theory of law, every case which arises for judgment is decided by some rule which already exists, yet the moment the judgment is made it has to some extent modified the rule, so that the difficulty of formulating an exact rule on any given subject increases rather

than diminishes with the number of decisions in which the courts have endeavored to apply the rule. As the work contains nearly 11,000 citations, it is apparent that it has cost much painstaking labor, not only in finding the citations, but in classifying and deducing rules from them. The plan pursued has been to state in as clear and accurate form as possible the principle of law involved, citing an authority directly in point, and following this by other citations bearing on the general principle involved, and quoting from leading cases upon any particular proposition, where practicable, the length of the quotation depending upon the importance of the question involved and the thoroughness of the investigation made by the court rendering the opinion.

Upon doubtful questions I have endeavored to give a full presentation of the conflicting views, and have given my own view of the better rule, believing that to do less would be to fail in my duty. While this opinion will not carry with it the weight of judicial decision, it will at least amount to a dictum, and will aid the investigator in determining the law on controverted points.

Where practicable parallel references have been given to West Publishing Company's System of Reports, Smith's Leading Cases, American Decisions, American Reports, and other collections of cases, as well as to the state reports. Great pains have been taken to refer to the very latest decisions, believing, with Chancellor Kent, "*that the best decisions are the latest, other circumstances being equal.*" Where a decision bears upon a general principle, yet is governed or limited by a statute, the statute has been given in the notes.

The writer believes that the arrangement, which is cov-

ered by copyright, will be of great advantage in enabling the attorney to quickly find the law on any given point, even without reference to the exhaustive index.

Part I. treats exclusively of questions likely to occur to the practitioner when preparing to commence an action in replevin; such as what property may be replevied, when replevin will lie, proper parties, demand, etc.

Part II. treats of all questions liable to arise in the conduct of a replevin action, commencing with affidavit and taking them up in the regular order of the progress of a case through the trial and appellate courts.

Part III. treats of suits on replevin bonds or to enforce the judgment in replevin, treating it in its regular and logical order.

The subject naturally divides itself into these divisions, and the line of division is as distinct and complete as between many subjects upon which separate treatises have been published. Thus the work is really three books in one volume.

The author trusts that this work will to some extent lighten the labors of a busy profession to whom it is fraternally submitted.

Beatrice, Neb., May 1, 1890.

A handwritten signature in dark ink, reading "J. E. Cobby". The signature is written in a cursive style with a large, sweeping initial "J" and a long, horizontal flourish extending to the right.

TABLE OF CONTENTS.

PART I

QUESTIONS ARISING IN PREPARING TO COM-
MENCE A REPLEVIN ACTION.

CHAPTER I.

HISTORICAL AND INTRODUCTORY.

	SECTION.
History	1
Derivation and definition.....	2
A writ of justice.....	3
One of the modes of redress for the loss of goods.....	4
Both parties are actors.....	5
Old forms of the action.....	6
Practice.....	7
Replevin in the old forms is unknown in this country.....	8
But are still recognized, though not in name.....	9
At common law replevin in the <i>cepit</i>	10
Common law replevin may be extended or limited by practice acts....	11

CHAPTER II.

SCOPE AND NATURE OF THE ACTION.

The gist of the action.....	12
It is not an extraordinary remedy like attachment.....	13
A court of chancery will not interfere.....	14
Replevin; suits in; how regarded by the courts.....	15
Replevin is strictly a law action.....	16
Distinction at common law between trespass, trover, and replevin....	17
Similarity of trespass, trover, and replevin.....	18
Replevin as used in America.....	19
Importance of the action.....	20
It is a mixed action partly <i>in rem.</i> and partly <i>in personam</i>	21
The action is grounded on a tortious taking.....	22
Object of the action, primary.....	23
secondary.....	24

	SECTION.
Scope of the investigation.....	25
The same—Illustrations.....	26
Replevin is strictly a possessory action.....	27

CHAPTER III.

LANDLORD AND TENANT—DISTRESS.

The landlord cannot sustain replevin for his share until it is set apart.....	28
The landlord in such a case should bring bill in equity, not replevin..	29
But if landlord's right is denied, he may replevy.....	30
Where the tenancy is for a definite time, replevin will not lie until the time is up.....	31
Landlord may replevy his share when ready for delivery.....	32
Crops on leased land belong to the tenant until gathered and divided	33
Assignee of landlord may replevy when share set apart.....	34
Where a tenant abandons his lease.....	35
A tenant has a right to possession even against the landlord.....	36
Distress—History.....	37
Gross abuses.....	38
Chief use was to collect rent.....	39
At first a distress could not be sold.....	40
Later rule under the statute of 2 W. & M., Ch. 5.....	41
The theory out of which distress grew.....	42
To authorize a distress must be an actual demise.....	43
Distress only lies for rent in arrears.....	44
It could be taken for any kind of rent.....	45
Distress as known at the common law is almost unknown in this country—Attachment takes its place.....	46
Where it could be made.....	47
What is triable in a replevin of a distress.....	48
Venire how laid in a replevin of a distress.....	49
Action by tenant—Tender.....	50

CHAPTER IV.

WHEN THE ACTION LIES GENERALLY.

When the action lies generally.....	51
The action lies generally when there has been an illegal taking.....	52
When it lies generally, old and modern rule.....	53
The same—Illustrations.....	54
The same—Negative illustrations.....	55
It does not lie for the purpose of determining the title to real estate	56
But will by a receiptor of goods.....	57
As regards possession.....	58
Replevin lies for property in the hands of a receiptor.....	59

CONTENTS.

xi

SECTION.

When right to possession alone sufficient when plaintiff must have legal title.....	60
Defendant must be in possession.....	61
What constitutes possession by an officer.....	62
Levy without possession is no ground for replevin.....	63
Replevin will not lie against one who is not detaining	64
Mere acts of ownership insufficient.....	65
Exception—Where property in defendant's possession is wrongfully transferred different rule by statute.....	66
Where only part of the property is taken.....	67
Cases depending upon particular facts.....	68

CHAPTER V.

WHAT PROPERTY MAY BE REPLEVIED.

What may be replevied—Examples.....	69
Will lie for wild animals once in actual possession.....	70
Does not lie for a corpse after interment.....	71
Money is not the subject of an action of replevin.....	72
Must be for certain specific articles.....	73
A life insurance policy may be the subject of replevin.....	74
So may public records, the seal of a court, and the fee book.....	75
When check, lease, or private papers can be.....	76
Stock or corporate property may be by custodian only, not by stock-holders.....	77
Parish records may be.....	78
Title deed may be.....	79
Scrip cannot be.....	80
County warrant can—Chose in action.....	81
Property must be <i>in esse</i> at commencement of the action.....	82
Property must be capable of seizure and delivery.....	83

CHAPTER VI.

WHAT TITLE WILL SUPPORT THE ACTION.

Peaceful possession is good evidence of title.....	84
The possession must be under a claim of right.....	85
Special property with actual possession.....	86
Absolute possession	87
Just what right of possession will support replevin	88
The interest sufficient to maintain trover is sufficient.....	89
As against a wrongdoer, prior possession alone sufficient.....	90
Ownership alone without possession not.....	91
The right of exclusive possession, coupled with an interest.....	92
Paramount title is not necessary as against trespassers and wrong-doers.....	93

	SECTION.
Right to the possession indispensable to maintain the action.....	94
Difference between action against stranger and general owner.....	95
An after-acquired interest will not support replevin.....	96
And the right of possession must also continue to the close.....	97
Right of possession at some former time cannot be tried.....	98
Plaintiff must recover on strength of his own title, not on the weakness of the defendant's.....	99
An equitable title alone will not support replevin.....	100
A special property interest in, is sufficient.....	101
The same—Illustrations.....	102
A holder of a bill of lading.....	103
A lien for advances.....	104
An auctioneer.....	105
Possession parted with conditionally—Bailor.....	106
Abortive sale.....	107
Possession by an agent.....	108
Possession of a stray for the statutory time will support it.....	109
Officer's possession after levy sufficient.....	110
One entitled to possession for temporary purpose can replevy from general owner.....	111
Where title is reserved by seller, his interest is sufficient to support replevin.....	112
Symbolical delivery sufficient.....	113
Right of property in fire company, baud, and other voluntary organizations.....	114
Certain special interests held not sufficient to maintain replevin—Illustrations.....	115
Neither is a landlord's lien.....	116
One tenant in common cannot.....	117
Statute of frauds—Title based on, insufficient.....	118
Title by gift insufficient.....	119
Title based upon promise by infant insufficient.....	120
A lien without the right of possession will not support replevin.....	121
Right to cut trees will not support replevin for trees cut by another.....	122
Title based on pretended but illegal judicial sale will not.....	123
Title based on an unexecuted or conditional contract.....	124
One who has placed the title in another is estopped.....	125
Surety on undertaking has not such an interest, for this reason, as will support replevin.....	126
Title to a half interest will not do.....	127
Proof of title without right to possession not sufficient.....	128
A right based on a special law must comply with the terms of the law strictly.....	129
To the right of property plaintiff must add the right of possession.....	130
While possession is <i>prima facie</i> title, it is not good against a superior title.....	131

CHAPTER VII.

WHO MAY MAINTAIN REPLEVIN.

	SECTION.
General rule.....	132
Either a general or special property is sufficient.....	133
Right to actual possession sufficient.....	134
Replevin may be maintained by one from whose possession it was taken without right.....	135
The same.....	136
Who may maintain replevin—Examples.....	137
Creditors of a common debtor.....	138
One of several defendants in an execution.....	139
State or United States may.....	140
An agent may bring replevin in his own name.....	141
Right to use property at will is sufficient.....	142
General property and right to possession sufficient.....	143
One entitled to possession for a special purpose.....	144
One who has lost possession wrongfully.....	145
Who may not maintain replevin—Examples—A surety on a stay bond.....	146
One who has pointed out property as that of another is estopped to replevy it.....	147
A stranger cannot.....	148
Contract against good morals.....	149
A servant.....	150
An administrator may replevy personal property of his intestate, but not special legacies.....	151
A pledgee has the right to possession.....	152
If an agent have only constructive possession, his wrongful transfer conveys no right or title.....	153
A married woman may maintain replevin without alleging coverture.....	154
A wife may replevy her own property from her husband.....	155
Husband cannot replevy from a wife he has abandoned.....	156
Where property is wrongfully taken from a lienholder, he may re- take it by replevin.....	157
A laborer's lien is protected—General owner cannot replevy.....	158
Liens generally—Illustrations.....	159
Effect of tender of amount of lien.....	160
But where a trespasser places the property in the possession of the lienholder, the true owner may replevy.....	161
Owner may replevy as against a stranger notwithstanding the lien.....	162
A finder of property has a lien on it for the reward offered.....	163
Finder may replevy from one taking property from him.....	164
Finder—Riparian owner—Replevin for involuntary deposit—Not an accretion.....	165
A receiptor of property has a greater interest than a naked bailee..	166
The same.....	167

	SECTION.
An officer may replevy from another officer or from a receptor or from the owner.....	168
"Other than the defendant" defined—The trustee and the individual are <i>quoad</i> the property different persons.....	169
"Stranger" defined.....	170

CHAPTER VIII.

MORTGAGOR AND MORTGAGEE.

History Mosaic law.....	171
As a general rule.....	172
After condition broken mortgagee may demand possession and replevin at any time.....	173
Mortgagee must always make demand.....	174
May bring against widow of mortgagor.....	175
There must be a breach before mortgagee can replevy—Effect of breach after suit commenced.....	176
Mortgagee cannot replevy on a partial breach.....	177
An assignee of the mortgagor is not an agent of the mortgagee, and cannot replevy on that ground.....	178
Mortgagor cannot replevy from mortgagee who has taken possession after condition broken.....	179
The contrary has been held.....	180
Where the mortgagor claims damage for a breach of conditions of sale, he may replevy.....	181
Illegality of the consideration of the mortgage, no ground for.....	182
Part payment no defense to replevin by mortgagee.....	183
Distinction between a mortgage and a pledge.....	184
Rule of damages in cases between mortgagor and mortgagee.....	185
Assignee of note can maintain replevin in his own name though mortgage is not assigned.....	186
Action may be brought in name of mortgagee, though not the real party in interest.....	187
Mortgagee may bring replevin even after he has sold.....	188
Mortgagee may replevy from a stranger after condition broken or after he has had possession.....	189
Right to follow to foreign state and replevy.....	190
Mortgagee may replevy from any one interfering with his right under the mortgage.....	191
But it must be an actual interference, not a threat to interfere.....	192
When mortgagee may replevy from officer levying on mortgaged property for debt of mortgagor.....	193
The same.....	194
The same—Proper judgment in such a case.....	195
That mortgagee has been summoned as a garnishee of the mortgagor no ground of.....	196
Where officer levies before mortgagee takes possession.....	197

CONTENTS.

xv

	SECTION.
Where no default has been made.....	198
An agreement to mortgage no ground for replevin.....	199
Mortgage given under duress—Void mortgage.....	200
Mortgagee must discharge lien for keeping stock first.....	201
Right of replevin between different mortgagees.....	202
Distinction between a mortgage given on a crop planted and on one to be planted.....	203
Where property commingled can only get the property described in mortgage.....	204
Where mortgagor wrongfully mixes goods, the mortgagee may replevy the whole.....	205
Mortgage alone not sufficient proof of title.....	206

CHAPTER IX.

AGENT, BAILOR, AND BAILEE.

A person dealing with an agent or bailee must look to the authority of the agent.....	207
Replevin will not lie by owner because agent sells at less price than he should.....	208
Where agent sells without authority owner may replevy.....	209
Bailee may replevy from a stranger to the title.....	210
Bailee may successfully defend against the owner as well as a stranger—Duty of bailee.....	211
Where the terms of the bailment are violated, replevin may be brought at once by the owner.....	212
Where a bailee pledges goods without authority, owner may replevy at once.....	213
A pretended sale by drunken bailee no protection to the purchaser.	214
Bailee's interest may be levied on and sold, and bailor cannot replevy.....	215
But if the whole thing be levied on, replevin will lie by the real owner	216
A bailee of property cannot dispute the title of his bailor.....	217
The general owner must tender amount of lien.....	218

CHAPTER X.

PARTNERS, JOINT OWNERS, TENANTS IN COMMON.

General rule.....	219
As to what constitutes a partnership or joint ownership.....	220
Right of officer to seize partnership property—Not settled.....	221
One partner may replevy from an officer seizing the whole property for the debt of the other partner.....	222
The same—Both owners can join and replevy.....	223
One partner, entitled to exclusive possession, may.....	224
The interest of partners—How considered.....	225

Effect of sale by one partner of his interest.....	226
Joint owners should join in replevin.....	227
Replevin by purchaser of partnership property attached by creditor of the firm.....	228
A tenant in common cannot replevy from an officer who has taken the whole on a writ against his co-tenant.....	229
One joint tenant cannot sustain replevin against his co-tenant.....	230
The same.....	231
And a levy on the interests of one is no excuse for replevin by the other.....	232
Where it is agreed that one shall have exclusive possession, that one can replevy from his co-tenant.....	233
The same—Tenants in common.....	234
Where by agreement one is to have exclusive possession, replevin will not lie by the other.....	235
Where one of two tenants in common convert the whole property, the other may replevy his interest.....	236
Joint tenancy is a matter of defense.....	237
Replevin will not lie for an undivided interest.....	238
It will not lie where the property of joint owners is not susceptible of division.....	239
It will not lie where the result would be to deprive a part owner of possession.....	240
When one joint owner may sever the property by his own act, with- out injury to the other, it will lie.....	241
Effect of severance by sale by one joint tenant.....	242
Pledge by one joint owner is good as to his interest, and replevin will not lie by the other.....	243

CHAPTER XI.

VENDOR AND VENDEE.

Right of vendor to replevy property sold.....	244
The same.....	245
Where the vendor reserves title in himself.....	246
Where title reserved, vendor may replevy from assignee.....	247
Where title is reserved and default is made, the vendor may replevy without tender back of partial payment.....	248
The same—May replevy even from U. S. Marshal.....	249
Where contract of sale is unconditional.....	250
Will not lie where condition is waived and property delivered.....	251
Sale by sample a conditional sale. Death of vendee before delivery	252
Use restricted to certain limits.....	253
But goods on commission not a sale on condition.....	254
Stoppage in <i>transitu</i> —Replevin by vendor.....	255
Where property is sold on agreement to give a note.....	256

CONTENTS.

xvii

	SECTION.
Must offer to return note before suing.....	257
Must pay back partial payments received on a rescission.....	258
Need not offer back payments made, where contract demand.....	259
Where it is impossible to restore, will not be required.....	260
When offer to restore must be made.....	261
Sale induced by fraud of vendee.....	262
A vendor may reclaim property obtained from him by fraud.....	263
A contract of exchange.....	264
Fraudulent purchaser takes a title voidable at the election of the defrauded vendor.....	265
It is not material when false representations were made so they preceded the consent of vendor—Meaning of consent.....	266
What circumstances justify a rescission.....	267
When no questions are asked silence not fraud usually.....	268
Payments in counterfeit money.....	269
Where an infant pleads his minority.....	270
Non payment no ground of rescission.....	271
When an insolvent honestly though hopelessly endeavors to go on, no fraud.....	272
Completion of payment stopped by garnishment no ground for rescission.....	273
Failure of vendee may justify a rescission.....	274
Must exercise his right of rescission promptly.....	275
Rule where possession by consent but based on fraud.....	276
What acts constitute a return and rescission.....	277
Effect and remedy on rescission of sale by vendor for fraud of vendee.....	278
Third persons, how affected—A defrauded vendor of goods may reclaim.....	279
May bring replevin and action for value at the same time.....	280
But cannot prove under bankrupt law and then replevy.....	281
May claim under an assignment and replevy at the same time.....	282
Where sold on execution vs. buyer—Cannot be replevied.....	283
Will not lie against purchaser in good faith.....	284
Goods obtained by fraud and levied on for debts of the vendee may be replevied.....	285
Goods obtained by fraud and used to pay a pre-existing debt may be replevied by true owner.....	286
Conditional sale—Vendee can sell his interest.....	287
What is wrongful detention.....	288
Does not lie by vendee to enforce contract of sale.....	289

CHAPTER XII.

RIGHT OF REPLEVIN BY AND FROM AN ASSIGNEE FOR BENEFIT OF CREDITORS.

An assignee is not a purchaser for value.....	290
An assignee represents the assignor.....	291

	SECTION.
Need not allege his official character in petition.....	292
His right depends upon his complying with the law.....	293
By assignor against assignee for exempt property.....	294
May replevy property retaken by the assignor.....	295
Replevin lies, by the seller, against the assignee of a fraudulent purchaser.....	296
Rights of a purchaser—Voluntary assignment—Title of assignee....	297
Assignee's suit subject to the same defenses as any other suit.....	298

CHAPTER XIII.

GOODS IN CUSTODY OF THE LAW.

Goods in custody of law—Old rule—Contempt.....	299
Modern rule—Not so strict.....	300
A stranger to the writ of seizure may replevy.....	301
The same.....	302
A purchaser of property so taken is not protected from replevin....	303
But where one's goods have been wrongfully seized by an officer and the owner thereafter acquires peaceful possession, he is protected therein.....	304
Mere irregularities in the taking insufficient.....	305
Exempt property may be replevied.....	306
The same—Construction—Costs.....	307
Exempt property may be replevied in any court having jurisdiction, notwithstanding the statute provides a special proceeding.....	308
Attached property may be replevied.....	309
But the action cannot be brought by the attachment plaintiff.....	310
But if he pay claim of plaintiff, may then replevy from the officer....	311
Where the process of seizure is void or the court had no jurisdiction	312
Property seized under an unconstitutional law.....	313
The writ must be lawfully executed.....	314
Lies for powder condemned by city officers.....	315
Liquors seized under a statute forbidding their sale cannot be replevied.....	316
Property seized by special officers of the law cannot be replevied....	317
Property seized by a revenue collector cannot.....	318
An assignee in bankruptcy is only protected when he acts strictly within the scope of his duties and authority	319
Receivers—Comity of states—Will respect officers of sister states....	320
Replevin lies against a receiver where he takes the wrong property	321
The legislature may bar the right by replevin.....	322
Property held by special order of court—Fine.....	323
Property held by U. S. marshal cannot be replevied in state court...	324
But where the marshal has taken the wrong person's goods, or is proceeding illegally, it will lie.....	325
Replevin for property illegally seized may be brought in any court having jurisdiction.....	326

CONTENTS.

xix

	SECTION.
May be brought where property is or where defendant resides.....	327
Removal of the property does not affect the jurisdiction.....	328
The action may be brought in any court of competent jurisdiction..	329
Replevin against attaching officer—Where brought.....	330
May be removed from state to federal court.....	331
When an execution defendant can replevy.....	332

CHAPTER XIV.

REPLEVIN OF PROPERTY SEIZED FOR A TAX.

The general rule.....	333
Errors in the assessment or in the warrant of collection no ground for replevin.....	334
Warrant must be regular and issued by proper authority.....	335
Illegality of the tax no ground for replevin.....	336
Excessive, double, or erroneous assessments—No ground for.....	337
Will lie when tax is void	338
Will not lie where part is valid and part invalid.....	339
Where A's property is taken on a warrant for B's tax, A may re- plevy.....	340
A purchaser from the officer is not thus protected	341
The same is true in case of seizure for a fine.....	342
Payment of tax after seizure no ground for replevin	343
May tender the legal tax and bring replevin	344
Property must be seized by an officer in his own district, or replevin will lie.....	345
The illegality of the corporation no ground for replevin—Writ must be executed by a regular officer.....	346
No other remedy is prohibited.....	347

CHAPTER XV.

REPLEVIN OF IMPOUNDED ANIMALS.

Replevin does not lie for impounded or distrained animals if the proceeding is regular.....	348
The same—Illustrations.....	349
If the distrainer lose possession, his lien is lost.....	350
Impounded cattle cannot be replevied for mere irregularities if ta- ken <i>damage feasant</i>	351
Where the statute gives a special remedy for testing the legality of the distraint, replevin will not lie.....	352

CHAPTER XVI.

THINGS WHICH MAY BE REAL OR PERSONAL PROPERTY ACCORDING TO
CIRCUMSTANCES.

	SECTION
General rule in regard to houses, trees, crops, grass, and other property which may be either real or personal property according to circumstances.....	353
When maintainable for property severed from the realty.....	354
Timber cut on land sold for taxes.....	355
A growing crop passes with a judicial sale of realty.....	356
Crops growing on mortgaged land are covered by the mortgage.....	357
A purchaser at a foreclosure sale cannot, before the sale is confirmed, replevy the crop.....	358
The general rule.....	359
Mortgagee cannot maintain replevin for property severed before he took possession.....	360
Where title is in litigation—Effect on crops.....	361
Right of mortgagee to replevy house removed unlawfully.....	362
When buildings are repleviable.....	363
The same.....	364
Where the intention of the parties make a building personalty.....	365
Fixtures may be removed by owner while in possession, not after... ..	366
The landlord's right to those fixtures originated in an implied gift..	367
Fixtures part of the realty—Illustrations.....	368
Fixtures severed from the realty become personal property.....	369
Trade fixtures.....	370
The same.....	371
Personalty—Where attached to land without owner's consent.....	372
A building or other fixture placed on the land of another with his consent is personal property.....	373
Cannot be maintained for timber severed from the freehold by an adverse claimant.....	374
The same, and other property.....	375
Proof necessary—Title—What is adverse possession.....	376
Replevin does not lie by one of two claimants of government land for the crops raised or grass cut by another claimant.....	377
Where a person claiming to own the land severs chattels.....	378
Property severed under contract of sale can be replevied by the vendee, not by the vendor.....	379
But where nothing was paid for the land and timber was fraudulently sold, the owner can replevy.....	380
In cases of disseizin.....	381
Chattels severed from realty.....	382
The same in case of trespasser.....	383
Owner may replevy property illegally severed by a tenant.....	384
Actual severance not necessary.....	385
Chattels severed by mistake.....	386

CONTENTS.

xxi

	SECTION.
Rights of the holder of a colorable title merely.....	387
Instances.....	388

CHAPTER XVII.

WHERE THE GOODS HAVE BEEN CHANGED IN FORM OR ENHANCED IN VALUE.

Change in form generally—Rule under the civil law.....	389
Rule now where property is changed in form.....	390
Rule—Description should be as it is in its new form.....	391
Right to replevin unaffected by change in form.....	392
Application of rule—Illustrations.....	393
Right of plaintiff not affected by change made by agreement.....	394
Owner should move to reclaim his property as soon as he knows of its loss.....	395
Where an innocent purchaser for value changes the form and adds to the value, replevin will not lie.....	396
The natural increase of live animals may be replevied by the owner of the animals.....	397
Animals—Increase of may be replevied by the owner of the dam—Exception—Where dam is hired for a term, increase belongs to the usufructuary	398

CHAPTER XVIII.

CONFUSION OF GOODS OF DIFFERENT OWNERS.

Generally.....	399
Of articles separable into aliquot parts, as pounds, bushels, etc.—Where the confusion is without malice, each owner takes his just proportion	400
Replevin can be maintained for part of mass if it can be identified...	401
The same—When for a part of cotton in mass.....	402
Loss, if any, must fall on the one causing the mixture.....	403
State or United States may replevy its property from mass.....	404
Where the confusion is occasioned by the willful act of one party, he must bear the loss.....	405
Articles that can be identified can be replevied—As to them it is not a confusion	406
One who willfully mixes property can only replevy that he can identify	407
Where the confusion is by agreement—Rule	408
Comingling of property—Right of part owner against a stranger	409

CHAPTER XIX.

GOODS ACQUIRED BY THEFT OR FRAUD.

Owner may replevy stolen goods wherever found.....	410
Against a thief, an innocent purchaser may elect to affirm the sale or exchange and keep the property.....	411

	SECTION.
Ratification cannot be inferred by lapse of time.....	412
Owner may replevy chattels obtained from him by fraud wherever found.....	413
It lies for goods obtained by the fraudulent use of the process of a court.....	414
Replevin will not lie for goods obtained by fraud, in the hands of innocent purchasers.....	415
Distinction between acquiring goods by theft and by fraudulent purchase.....	416
When property traded for stolen property may be replevied.....	417
Trade or barter of property—Fraud—Rescission of contract.....	418
Replevin will lie where possession is obtained by fraud of defendant	419
Markets overt, unknown in this country.....	420
One who has participated in the fraud, or his representatives, can not regain possession by replevin.....	421
A purchaser of stolen property cannot maintain replevin against the owner who has acquired possession.....	422

CHAPTER XX.

ON PARTIES—PLAINTIFF AND DEFENDANT—INTERVENTION AND SUBSTITUTION.

Plaintiffs generally.....	423
Trustees—Executors—Administrators	424
The action must be brought in name of real party in interest.....	425
Wife may maintain in her own name.....	426
Non compos mentis.....	427
Assignment of the right to replevy property—Sale.....	428
Joint owners must join as plaintiffs.....	429
Where property is owned by two jointly.....	430
Defendants generally.....	431
Who is the proper defendant.....	432
Defendant must have possession at the time the suit was commenced	433
But will lie against one having the legal title, though the property has not been moved by him.....	434
But if he wrongfully took it and disposed of it to avoid the replevin, he is a proper defendant.....	435
An officer who levies upon property wrongfully is the proper defendant and not the party he represents—Constructive possession...	436
The same—Execution—Constructive possession.....	437
Constructive possession—Mere paper levy insufficient.....	438
Power and authority of the officer as a defendant in such cases.....	439
Where judgment plaintiff directs the officer to levy on specific property, he is liable.....	440
Co-defendants—Who may be.....	441
One of two wrongdoers may be sole defendant.....	442

The one having the actual possession the proper defendant, though acting for another.....	443
Intervention—Change and substitution of new defendants—Lien-holders—Costs.....	444
Trial of the right of property cannot be turned into replevin—Intervenor.....	445
Intervention—Substitution.....	446

CHAPTER XXI.

DEMAND AND TENDER TO DISCHARGE LIEN.

Demand necessary—When—Rule.....	447
Reason of the rule—Plea of title in defendant waives demand.....	448
Effect of demand and refusal.....	449
When both parties claim an absolute title, demand not necessary...	450
Want of demand must be taken advantage of in time—Willingness to surrender.....	451
Office of demand—By whom made.....	452
Where plaintiff relies upon a wrongful detention and taking, demand unnecessary.....	453
Demand necessary when title is acquired in good faith for value, but not necessary where title is acquired in fraud.....	454
Demand not usually necessary to sustain replevin on ground of wrongful detention.....	455
Not necessary against an innocent purchaser of a fraudulent vendee—Necessary to terminate a right of possession.....	456
When a rightful possession becomes wrongful—When demand necessary.....	457
When the original taking is not wrongful, demand must be made....	458
Acts of dominion on part of defendant will excuse demand.....	459
Title of record does not excuse.....	460
Assignee must give notice and make demand.....	461
Demand must be made where plaintiff puts property in defendant's possession, and he merely allows it to remain.....	462
Not necessary where trespass committed in the taking—Stolen goods.....	463
That the possession of the defendant is in good faith of no avail if original taking was fraudulent.....	464
Where possession obtained by fraud, demand is unnecessary.....	465
To be protected, an officer must keep strictly within the command of his writ.....	466
Demand need not be made on wrongdoer, but must on a <i>bona fide</i> holder—Demand on agent of limited authority insufficient—waiver of demand.....	467
To recover costs, demand must be made—Waiver of demand—A general denial not.....	468

	SECTION.
Possession of goods by mistake—Lien.....	469
Taker up of strays—or to save property.....	470
Necessary from a borrower of lost goods.....	471
Possession acquired in good faith—Demand necessary.....	472
But a contrary rule has been laid down.....	473
Conversion—Refusal to deliver in advance of demand.....	474
Excuse for not complying with demand—True reason.....	475
When demand should be made—When action commenced.....	476
Demand after affidavit signed—Defective, how cured.....	477
Demand after issuance of writ.....	478
Proof of—When made.....	479
Time when demand should be made—Where defendant has a right for a limited time.....	480
A demand of one not having authority.....	481
If proved failure to allege is cured after trial.....	482
Written demand must be specific.....	483
Of person in charge sufficient—In case of decedent.....	484
Acts and notice equivalent to demand—Intervenor.....	485
Of the indices of ownership sufficient.....	486
A demand made in violation of an injunction not good.....	487
A mortgagee of chattels must make demand of an officer.....	488
Mortgagee must make demand of one in possession—Absconded mortgagor.....	489
Action against sheriff.....	490
Action by mortgagee vs. mortgagor.....	491
Trustee after default need not demand.....	492
A mortgagor to replevy back must demand.....	493
Where property taken under an illegal mortgage, demand not nec- essary by the owner.....	494
Also where plaintiff repudiates a delivery made under a void agree- ment.....	495
Must be made of a purchaser at an execution sale, or an officer.....	496
When demand of an officer proceeding under a writ of attachment or other process is necessary—Execution.....	497
When the property of a stranger to the writ is sold.....	498
But where property is found by the officer in the actual custody of the defendant in execution.....	499
In replevin for exempt property.....	500
But purchaser when entitled to demand.....	501
Conditional sale—Part payment.....	502
Fraud by vendee—Attaching or other creditor—No demand neces- sary.....	503
Vendee must make demand of third party in possession.....	504
When demand necessary to put the vendor in the wrong.....	505
If vendee's possession lawful, demand must be made.....	506
But if he violate the contract of sale, not.....	507
Purchaser must demand and tender amount of his bid.....	508

CONTENTS.

XXV

	SECTION.
Same of sheriff's sale.....	509
Sufficient demand, claim of ownership by defendant—A waiver.....	510
Where a person known to be an agent exceeds his authority.....	511
Not necessary where bailee wrongfully sells property or converts it	512
The manner of defendant's possession does not affect the necessity of demand.....	513
Tender when necessary to discharge lien before suit brought against common carrier.....	514
The same—What issues triable—Offset.....	515
Excessive charges—Tender of proper amount.....	516
Of note or property received in payment.....	517
Tender must be unconditional.....	518
So must refusal.....	519
Tender before action brought.....	520
Where defendant has a lien—Innkeeper or carrier.....	521
Landlord's lien—Mortgagee.....	522
Where a tradesman has a lien.....	523
Expenses advanced under a wrongful levy cannot be recovered.....	524

PART II

QUESTIONS ARISING IN THE PROSECUTION AND DEFENSE OF AN ACTION IN REPLEVIN.

CHAPTER XXII.

THE AFFIDAVIT, COMPLAINT, DECLARATION, AND PETITION.

The affidavit—Its history and what it is.....	525
Importance of the affidavit, complaint, declaration, or petition.....	526
An affidavit must be filed in all cases.....	527
The defendant alone can take advantage of failure to file affidavit..	528
Jurisdiction depends upon affidavit.....	529
It must be signed and sworn to.....	530
Allegations of the affidavit should be in the present tense.....	531
Right of possession must be alleged—Illustrations.....	532
"Owner" and "ownership" defined.....	533
Affidavit must allege the property was not taken for tax, etc.....	534
Must allege that it was not taken on execution or attachment.....	535
Or all facts making the property exempt from seizure must be al- leged	536
This allegation need not be in the exact words of the statute.....	537
Must state that it was not taken on a writ of replevin.....	538
The affidavit should state the value of the property.....	539

	SECTION.
Allegations of value are not binding on the trial.....	540
When value in affidavit governs—Proper practice.....	541
Must allege wrongful detention—Illustrations.....	542
Distinction between “he detains” and “he detained”.....	543
The law requires a more particular description in replevin than in trespass or trover.....	544
A variance in description is fatal.....	545
Copies of written instruments need not be set out.....	546
A description which can be made definite is good.....	547
Description may be amended to correct mistake.....	548
What description sufficient—The best possible will do.....	549
Description by kind or quantity.....	550
Undivided interest—Fractional part as a description.....	551
Where articles are numerous, a general description.....	552
Sufficiency of—Defects waived by pleading.....	553
When sufficiency is a question of fact, and when of law.....	554
Nature of plaintiff's interest need not be particularly alleged.....	555
Special interest must be pleaded.....	556
Allegations in the alternative not fatal.....	557
But they must be definite as to the person entitled to possession....	558
Plaintiff cannot take inconsistent positions.....	559
The affidavit may be made by an agent or attorney.....	560
Agency, how stated.....	561
How made when corporation is the complaining party.....	562
There is a distinction between a good cause of action defectively stated and a defective cause of action.....	563
Venue should be laid in the county.....	564
Plaintiff may replevy property held by different titles in one action	565
Redundant or irrelevant matter may be stricken out.....	566
The statutory allegations of the affidavit are not conclusive of the facts stated.....	567
Fatal defects in affidavit—Illustrations.....	568
An affidavit in replevin may be amended.....	569
Damages claimed may be enlarged by amendment.....	570
The proper way to amend is by a new affidavit.....	571
Signature and jurat may be added <i>nunc pro tunc</i> by amendment....	572
Amendment sworn to by different agent of plaintiff from original affidavit may be filed as a matter of right.....	573
Effect of failure to amend substantial defect.....	574
Cannot thus add a new cause of action.....	575
Cannot strike out part of the property by amendment on appeal....	576
May amend by adding new article.....	577
Jurisdictional defects cannot be thus cured.....	578
Cannot amend by making new parties.....	579
Total lack of affidavit cannot be cured by amendment.....	580
Statutory form of affidavit is but a general guide.....	581
Need not follow particular form.....	582

CONTENTS.

xxvii

	SECTION.
Requisites of affidavit.....	583
Approved form of affidavit.....	584
Another form of action should not be joined with replevin.....	585
The affidavit need not be separate from the complaint.....	586
Affidavit takes the place of all other pleadings by plaintiff.....	587
A complaint may be used as an affidavit.....	588
Complaint—Affidavit.....	589
Sufficiency of complaint.....	590
What constitutes a good complaint—Illustrations.....	591
By sheriff, in case of attached property.....	592
What the declaration or complaint should contain.....	593
Declaration.....	594
Declaration must follow affidavit.....	595
Must make issuable allegations.....	596
Artificial words not to govern.....	597
When both affidavit and petition are used, petition need not be as specific as the affidavit.....	598
Where both are used, the affidavit is not a part of the pleadings.....	599
Petition—Illustrations.....	600
Plaintiff must stand or fall by title alleged in his petition.....	601
Petition should be construed as a whole.....	602
Special damages must be specially pleaded.....	603

CHAPTER XXIII.

THE WRIT—ITS HISTORY AND USE.

Originally the writ of replevin was not returnable.....	604
The writ <i>non omittas</i>	605
<i>Alias</i> and <i>pluries</i> writs.....	606
Writ issued only at Westminster.....	607
Origin of present writ and proceeding.....	608
Writ of <i>withernam</i>	609
Conclusion.....	610
Issuing of the writ merely a ministerial act.....	611
Must be by authority and under a valid law.....	612
To whom directed.....	613
Where the sheriff is a party directed to the coroner.....	614
What the writ should contain.....	615
When returnable.....	616
Description.....	617
The same—Illustrations.....	618
Sufficient if with outside help the property can be identified.....	619
The description may be amended.....	620
If there is a total lack of description, the writ is void.....	621
Writ need not state the value of the property.....	622
Where bond is filed first.....	623

	SECTION.
Rule in regard to replevin of attached property.....	624
The writ is under the control of plaintiff.....	625
Date of the writ is not conclusive as to the time of commencing the action.....	626
Writ may be amended on trial as to value.....	627
Misnomer, how amended.....	628
<i>Alias</i> writ, when issued.....	629
There can be no new service under a void writ.....	630
Cannot take part of the property and arrest defendant too on same writ.....	631

CHAPTER XXIV.

SERVICE OF THE WRIT.

Duty of the sheriff under a writ of replevin.....	632
The officer should serve the property first.....	633
Service on the property means actual seizure.....	634
Sheriff's right of possession limited.....	635
Constructive possession, when good.....	636
Failure to serve the defendant is cured by appearance.....	637
The sheriff's duty to take bond—Liability for neglect.....	638
Measure of damages where officer has lost the replevin bond.....	639
Should hold property to allow plaintiff to give bond.....	640
Sheriff does not have to prepare bond.....	641
Must use good judgment in serving the writ.....	642
Must see that the writ is regular on its face.....	643
Officer protected from trespass suit in service of.....	644
And trover will not lie against the officer.....	645
The writ is no protection to the plaintiff.....	646
May break and enter to serve the writ.....	647
Sheriff should make his authority known.....	648
Officer cannot take property from the person.....	649
May sever articles attached to real estate.....	650
A replevin writ cannot be executed on Sunday.....	651
Sheriff may take the property named in his writ when found in a stranger's hands.....	652
The contrary doctrine has been held under some statutes.....	653
The officer in all cases should use a sound discretion.....	654
Defendant does not have to assist the officer.....	655
Power of court to compel defendant to surrender property.....	656
Secreting or driving property away is not contempt.....	657
Should make return to the court issuing the writ.....	658
The return should be made full and complete and without delay....	659
An officer's return is a part of the record.....	660
The return is conclusive between the parties.....	661
Return cannot be impeached by statements of sheriff.....	662

CONTENTS.

xxix

	SECTION.
The return may be amended.....	663
If served on defendant, but not on the property, the action proceeds as in damages.....	664

CHAPTER XXV.

THE BOND, ITS IMPORTANCE AND CONDITIONS.

Importance of the bond.....	665
Replevin cannot be prosecuted <i>forma pauperis</i>	666
Wealth of the plaintiff does not excuse from giving bond.....	667
The bond is not necessary to the trial.....	668
Bond at common law, its conditions.....	669
Essential requisites of statutory bond.....	670
The several conditions are separate and independent of each other.....	671
Its conditions are fixed by statute.....	672
May be good though it does not conform to the statute.....	673
Bond in replevin under special acts.....	674
Statutory bond is indispensable.....	675
The object of requiring a bond.....	676
Court may require a statutory bond.....	677
Court cannot interfere with the discretion allowed the sheriff.....	678
The officer is the exclusive judge of the sufficiency of the bond in the first instance.....	679
Court may permit new bond that surety may testify.....	680
What is proper execution.....	681
The same—Execution.....	682
Bond need not be under seal.....	683
Time allowed in which to execute bond—How computed.....	684
Ordinarily bond should run to the defendant.....	685
Liability of sheriff for not taking proper bond.....	686
Amount of bond, how fixed.....	687
Sheriff responsible for undervaluation or improper bond.....	688
If bond good when taken, it is sufficient.....	689
Officer is not responsible if the parties agree on a keeper.....	690
Practice where bond is given before writ issues.....	691
Exact form or name of bond not material.....	692
A good bond necessary to valid service.....	693
Where sufficiency of bond must be excepted to.....	694
Objection, how made—Must be before trial.....	695
Bond is not void for mere technical defects.....	696
The court should allow bond to be amended.....	697
Replevin bond may be amended.....	698
When bond invalid—Illustrations.....	699
Ordinary bond does not take the place of security for costs.....	700
Giving redelivery bond waives what defenses.....	701
Effect of bond on title.....	702
Does not give plaintiff a new title.....	703

CHAPTER XXVI.

CUSTODY OF THE PROPERTY PENDING SUIT.

	SECTION.
At common law plaintiff took the property as his own.....	704
Status of property taken in replevin under the codes.....	705
Property taken in replevin is in the custody of the law.....	706
The custody of the property is under the control of the court.....	707
While the replevin suit is pending the property cannot be seized on execution or other process.....	708
Conflict of jurisdiction—Custody of property cannot be taken from court issuing the writ.....	709
Nor can another action for its value be brought.....	710
Sheriff liable for custody of property until bond given.....	711
Plaintiff has a right to possession while the suit is pending.....	712
Different rule in Missouri.....	713
Law allowing defendant to retain it must be followed strictly.....	714
Title during suit—Redelivery bond—Second replevin.....	715
Plaintiff in replevin not liable as garnishee.....	716
Proceedings in sister states—Property tortiously replevied—Re- moved and sold.....	717
Property taken in replevin is in the custody of the law—One unlaw- fully disturbing that possession may be punished for contempt.....	718
Money deposited in lieu of bond is not in <i>custodia legis</i>	719
A replevin merely suspends a prior levy.....	720
Effect of sale made by party in possession.....	721
The same.....	722
Injuries to goods in plaintiff's possession.....	723
Effect of loss or destruction of property.....	724
Surety on the bond cannot hold the property against the owner....	725

CHAPTER XXVII.

ANSWER.

Appearance and pleading waives defects.....	726
Insufficiency of description is waived by pleading.....	727
Giving a redelivery bond is a waiver of defects.....	728
Too late to object to the sufficiency after verdict.....	729
Objections, how taken.....	730
Avowry.....	731
Cognizance.....	732
The nature of these pleas.....	733
Pleas to an avowry.....	734
Avowry is the usual plea to replevin of a distress.....	735
Set-off, to be allowed, must arise out of the leasing.....	736
Avowry as a distinct plea is little used.....	737
The pleas of <i>non cepit</i> and <i>non detinet</i>	738

CONTENTS.

xxxi

SECTION.

The plea or answer of defendant.....	739
A plea of <i>non cepit</i> admits the property to be in the plaintiff.....	740
The plea of <i>cepit in alio loco</i>	741
Special matter cannot be shown under <i>non cepit</i>	742
Issue raised by <i>non detinet</i>	743
<i>Non detinet</i> cannot be pleaded for <i>non cepit</i>	744
Plea of not guilty.....	745
Proper pleading under the codes.....	746
The denials of the answer must be full and explicit.....	747
Plea must be certain to a common intent—Liberalily construed.....	748
Evidence should not be pleaded, but facts stated.....	749
What is a good general denial.....	750
Effect of and what may be proved under.....	751
Fraud may be proved under a general denial.....	752
Evidence of matter in estoppel.....	753
General denial does not compel proof of the negative averments.....	754
Under general denial may justify under a writ.....	755
May show official character as administrator.....	756
Justification under writ—Proper averments.....	757
Justification—Burden of proof.....	758
Answer should allege amount, levy, and validity of writ.....	759
If the officer did not take the property from defendant, must allege that it was his.....	760
Matter of inducement in plea is not traversable.....	761
By officer—What answer should be—In case of fraud.....	762
Defendant may plead as many separate defenses as he may have....	763
All defenses must refer to the time the suit commenced.....	764
Where there are several defendants.....	765
How far court may control defendant's pleading.....	766
Effect of plea of property in defendant.....	767
Plea of property in a third person is good.....	768
A plea in bar is a good answer.....	769
Jurisdiction—Plea in abatement.....	770
Illustrations of sufficient answers.....	771
Replevin by a mortgagee—Defense.....	772
Plea of payment—No recovery for over payment.....	773
Answers defective in substance—Examples.....	774
Special pleas—Incomplete defenses—Sufficient answer.....	775
Contradictory defenses.....	776
Defendant cannot anticipate special title not pleaded by plaintiff..	777
Cannot show death of property under general denial.....	778
A special property interest cannot be shown under a general denial	779
Usury should be specially pleaded.....	780
Fraud should be specially pleaded.....	781
Answer need not claim a return.....	782

CHAPTER XXVIII.

DEFENSES.

SECTION.

Defenses generally.....	783
Plaintiff must show right of possession against the world.....	784
Title in a third party is a good defense.....	785
Outstanding title in third person, when available	786
General rule as to availability of such a defense.....	787
It is no defense that the goods are subject to a prior mortgage.....	788
Where the statutes provide that claimants shall be made parties, a contrary rule has been laid down.....	789
Remedy by intervention not exclusive.....	790
Recoupment and set-off not allowed in replevin.....	791
A tort cannot be justified by a set-off	792
Rule in case of a chattel mortgage—Usury a good defense	793
Courts should give the action such flexibility as to do justice, where possible.....	794
An off-set may be pleaded against the damages.....	795
Any defense interposed must have relation to the commencement of the action.....	796
Defense cannot be changed after suit brought.....	797
Failure of plaintiff's title after action brought is no defense.....	798
Estoppel—Waiver.....	799
The effect of death of one of the parties does not abate the suit	800
Where a contrary doctrine has been held it is under a statutory en- actment.....	801
Where one of two defendants dies, does not abate.....	802
Justification under a writ is a good defense.....	803
Justification—How pleaded and proved.....	804
An officer from whom attached property is replevied cannot urge informal defects as a defense.....	805
A valid judgment must be alleged in case of a levy by execution	806
A <i>fi fa</i> is a good defense by an officer, but not by plaintiff in execu- tion	807
Trial of the right of property and judgment in favor of the officer is a good defense	808
The pendency of another action involving the same question is a good defense.....	809
It must be a final judgment on the same issue.....	810
Where defendant pleads a former adjudication, he must show all the facts.....	811
A judgment on other issues is no defense.....	812
What plea in abatement must contain to be a valid defense.....	813
When plea in abatement proper—Examples.....	814
A special right of possession is a good defense.....	815
A lien in a third person no defense.....	816

CONTENTS.

xxxiii

	SECTION.
Title acquired by possession alone may be a good defense.....	817
A tax warrant is a good defense.....	818
Title acquired from plaintiff is a good defense.....	819
A judgment in trover for the conversion.....	820
A claim of title in defendant is a good defense.....	821
That the property is not identical is a good defense.....	822
Statute of frauds—Who can plead it.....	823
Fraud as a defense must be specially pleaded.....	824
What are proper defenses—Examples.....	825
A defense based on a special law must show full compliance with that law.....	826
Defenses proper in case of a distress.....	827
Defense is waived if not taken advantage of in time.....	828
Improper defense—Examples.....	829
Destruction by “act of God” not a good defense.....	830
Death of the property may be shown in mitigation of damages.....	831
Taking by a soldier in time of war, no defense.....	832
Garnishment is no defense.....	833
Purchase in market overt or at public sale, no defense.....	834
Right of homestead no defense against replevin by a mortgagee.....	835
A prior foreclosure in chancery is a good defense.....	836

CHAPTER XXIX.

REPLY.

It is seldom that a reply is necessary.....	837
Reply necessary in case of an avowry—Illustrations.....	838
Where the answer is a general denial, no reply necessary.....	839
Property in a third person needs no reply.....	840
A contrary rule has been laid down.....	841
Claim of damage needs no reply.....	842
Requisites and sufficiency of the replication.....	843

CHAPTER XXX.

DAMAGES.

A difficult subject.....	844
History and general principles.....	845
May be allowed to both parties.....	846
Damages not the subject of an independent action.....	847
Must be confined to matters arising out of the wrongful taking or detention.....	848
So only matters arising out of the replevin suit can be urged in mitigation of damages.....	849
Value of property and damages should be found separately.....	850
Defendant not entitled to damage unless he claim a return.....	851

Rule where property has been returned to defendant and plaintiff prevails.....	852
General rule of damages—Where plaintiff prevails.....	853
Measure of damages affected by the interest of plaintiff.....	854
If the plaintiff prevail in the action, but the property has not been delivered to him.....	855
General rule of damages where defendant prevails.....	856
If the defendant succeed in the action.....	857
Rule where the successful party has the right to elect.....	858
Right of court to assess the damages.....	859
How assessed on dismissal or nonsuit.....	860
Jury cannot give more than is claimed in the pleadings.....	861
Limit of defendant's recovery.....	862
Plaintiff's damage where he has had possession.....	863
Measure of plaintiff's damages where he is not able to give bond.....	864
Defendant's damages where plaintiff has had possession.....	865
That defendant re-acquired the possession before the determination of the suit may be shown in mitigation.....	866
Death or destruction of the property does not lessen the liability....	867
The same.....	868
Death of slaves—Pending suit—No defense to judgment for value.	869
The rule the same in case defendant keeps the property and gives a delivery bond.....	870
Emancipation of the slaves in dispute no defense.....	871
Where property is hopelessly lost or destroyed.....	872
That plaintiff had delivered the property to a receiver of defendant does not lessen his liability.....	873
That a party has transferred his title may be shown in mitigation of damages.....	874
Possession of the property during the pendency of the suit may be shown in mitigation.....	875
Where successful party has become repossessed, his damages are what it cost him to get possession.....	876
Interest as a proper measure of damages.....	877
Interest not allowed where the value is fixed at a time subsequent to the taking.....	878
The ordinary damage is the value at the time of taking, with interest on that value.....	879
Where property is not taken, the rule is ordinarily the value with interest.....	880
The rule the same as in trover.....	881
Interest is not in the nature of special damages.....	882
If property returned, interest no part of the damage.....	883
Interest on the value has been held to be discretionary with the jury	884
Interest and profits both can not be allowed as damages.....	885
Interest not always a proper measure of damages.....	886
Interest not the measure of damages where property has usable value.....	887

CONTENTS.

xxxv

	SECTION.
The same	888
Excessive damages must not be allowed for use.....	889
The purpose for which property is used should be considered in estimating the value of use.....	890
The usable value a proper element of damages.....	891
Damages for use need not be specially claimed.....	892
Damages for use cannot be recovered in a separate action.....	893
Plaintiff cannot have damages for the use and for value too.....	894
One who has no right to use the property as a pledgee or an officer cannot recover for the use.....	895
If one without any right replevy the property, the rule is different..	896
The party claiming the use must show that he was in position to use it.....	897
Interest may be allowed on the usable value.....	898
Measure of damages between vendor and vendee.....	899
Measure of damages in suit for promissory note or other evidence of debt.....	900
In case of stocks is the value on day of trial.....	901
Where it has been decreased in value by the act of the defeated party, he is responsible for the loss.....	902
In the case of keepsakes, souvenirs, etc.....	903
Damages to compel a return.....	904
Measure of damages as between joint owners.....	905
The damages for property severed from real estate.....	906
Measure where property has been severed and increased in value by defendant acting in good faith.....	907
A willful trespasser not entitled to anything for his labor.....	908
General rule of damages where property has been changed in form	909
If the original owner recover the value of his property at the time it was taken.....	910
Pleadings may be amended to show change in value pending the litigation	911
Where the value of the property has been increased by a willful wrongdoer.....	912
Where the defeated party acted in good faith, he is entitled to the increase of value from his labor.....	913
Depreciation in value is a proper element of damage.....	914
Under a wrongful taking the defendant is liable for the depreciation	915
Where the holder neglects the property, he is responsible for the loss in value.....	916
Where property was injured in the hands of a wrongful taker, the expenses of doctoring and care are properly allowable as damages.....	917
Deterioration in value in hands of defendant—Expenses incurred in searching for property by plaintiff.....	918
Loss from interruption of business and machinery lying idle.....	919
Expenses, counsel fees, etc.....	920

	SECTION.
The same—Illustrations.....	921
Money paid a security company to furnish bonds cannot be allowed as damages.....	922
Expenses of taking and removing property.....	923

CHAPTER XXXI.

DAMAGES CONTINUED.

Punitive, exemplary, or vindictive damages are sometimes allowed	924
The rule of damages the same as in trespass.....	925
The terms punitive, exemplary, and vindictive are misleading.....	926
Exemplary damages must be pleaded and proved, or they will not be upheld.....	927
Actual malice must be shown	928
No general rule can be laid down in such cases.....	929
The same—Illustrations—In cases of malice	930
The party claiming damage must not be guilty of contributory negligence.....	931
A wrongdoer cannot be allowed to make a profit out of his wrong- ful act.....	932
Vindictive damages against an officer seldom given.....	933
Special damages must be specially proved.....	934
Special damages in favor of defendant.....	935
A voluntary payment of a lien cannot be recovered back.....	936
At what time value should be fixed.....	937
Value should be assessed as of time of trial.....	938
Where the value is fluctuating.....	939
The same.....	940
Rule followed in different cases where value not stable.....	941
What is meant by highest market value.....	942
Full indemnity the object of all rules of damage.....	943
The value should be fixed at the place where the property was.....	944
The rule in trover is frequently followed.....	945
Rule where produce is shipped to a distant market.....	946
A willful wrongdoer will not be allowed what his labor has added to the property.....	947
Value of gold coin, at what time fixed.....	948
Nominal damages are incident to success.....	949
To recover more than nominal damage, actual damage must be al- leged and proved.....	950
Nominal damages as affected by demand and interest of the party	951
Rule where only a part of the property is recovered.....	952
In contests between a mortgagee and an officer.....	953
The same—Illustrations.....	954
Mortgagee can only recover the amount of his claim.....	955
Where the taking was with malice.....	956

CONTENTS.

xxxvii

	SECTION.
An officer's damage is the face of his writs.....	957
Measure of damages where defendant held by execution.....	958
Where an officer is wrongfully dispossessed, his damage is the value of his writs and interest.....	959
Where the writs are for too much, he can only recover the amount justly due.....	960
Cannot recover for use or detention in addition to value.....	961
His valuation evidence against him.....	962
Where the replevin is tried before the attachment suit, his lien will be protected.....	963
Rule in replevin between different officers.....	964
As against an intruder the officer is entitled to the full value of the property.....	965
An intruder is liable for damages whether the other party owns the property or not.....	966
Damages against sheriff or other officer seizing under a writ.....	967
As against a stranger, the special owner is entitled to the full value of the property.....	968
Pledge—Bailor and bailee—Stranger.....	969
In contests between the general and special owners.....	970
Special ownership measure of damages.....	971
Prospective profits are too remote, and are not an element of damage.....	972
The same—Illustrations.....	973
Loss of probable profits is sometimes allowed.....	974
Rule of damages—Summary.....	975
In conclusion—Author's rule—Postulates.....	976

CHAPTER XXXII.

EVIDENCE.

The nature and scope of the evidence.....	977
Evidence must be confined to the issues.....	978
Evidence must be confined to status at commencement of the action.....	979
Matters of inducement are no part of the traverse.....	980
Facts admitted by the pleadings need not be proved.....	981
The formal negative averments need not be proved.....	982
Evidence of any matter necessary to understand the main issue should be admitted.....	983
<i>Res gestæ</i>	984
<i>Res gestæ</i> —Intention and declarations of third persons when admissible.....	985
Declarations of plaintiff not admissible in his favor.....	986
<i>Res gestæ</i> —Declarations of party in possession.....	987
When and how far statements of a vendor admissible.....	988
It must be shown that defendant had possession at the commencement of the action.....	989

	SECTION.
Proof that property was in defendant's possession, how made.....	990
Slight circumstances are sufficient to show possession by defendant.....	991
The identity of the property should be shown.....	992
Variance.....	993
Conversion must be shown.....	994
In replevin the question of value is not in issue.....	995
On the subject of value, the affidavit is competent, but not conclusive.....	996
The appraisement is not conclusive of value.....	997
Value should be shown, though no question is raised thereon.....	998
Though a contrary rule has been followed.....	999
Value, how shown.....	1000
Evidence under a general denial.....	1001
Issue in replevin—Evidence under a general denial.....	1002
The same—Illustrations.....	1003
Evidence admissible under <i>non detinet</i>	1004
Evidence under plea of property in defendant.....	1005
Where the question is one of title, plaintiff must show both title and right to possession.....	1006
The writ of attachment under which an officer justifies is proper evidence.....	1007
An officer must prove his official character.....	1008
Service on the attachment defendant must be shown to conclude him.....	1009
What may be shown where defense is title under a writ—Illustrations.....	1010
The same.....	1011
As to matters accruing after a suit.....	1012
Rule of evidence where the foundation of title is an execution.....	1013
Where fraud is the issue, considerable latitude in the proof should be allowed.....	1014
The burden is on the pleader of fraud to prove it.....	1015
Need not be definite as to place of detention.....	1016
Possession of personal property is <i>prima facie</i> proof of ownership.....	1017
Right of possession proved by proof of ownership.....	1018
Illustrations of proper evidence in cases depending upon particular facts.....	1019
The same.....	1020
Illustrations of matter held too remote from the main issue.....	1021
Proper evidence in replevin of exempt property.....	1022
How far title to real estate may be considered, and how shown.....	1023

CHAPTER XXXIII.

INSTRUCTIONS.

Theory of instructions.....	1024
Instructions should be confined to the issues involved.....	1025

CONTENTS.

xxxix

	SECTION.
When no conflict court may direct verdict.....	1026
When jury may be instructed that detention is not disputed.....	1027
When the action lies.....	1028
Right to possession of property sufficient.....	1029
As to what right of possession will support the action.....	1030
Taking possession when not practicable by an officer.....	1031
Where title passes between vendor and vendee.....	1032
Where both parties claim the property.....	1033
Damages	1034
Damages for use.....	1035
Burden of proof.....	1036
On wrongful detention.....	1037
Wrongful detention by bailee.....	1038
Possession evidence of title.....	1039
Ownership of property—Weight of evidence—Credibility of witnesses	1040
Buildings, when personal property.....	1041
Growing crops.....	1042
Demand not necessary.....	1043
Demand necessary.....	1044
Proper demand.....	1045
Where demand necessary against officer.....	1046
Value of return as evidence.....	1047
Mortgage—Tender to discharge lien.....	1048

CHAPTER XXXIV.

VERDICT AND FINDING.

The verdict should respond to all the issues raised by the pleadings	1049
Verdict must be construed with reference to the pleadings.....	1050
The same—On plea of <i>non detinet</i> and <i>non cupit</i>	1051
The language should be so construed as to sustain the verdict if possible	1052
Findings are governed by the same rules as verdicts.....	1053
Mere informalities not fatal to recovery.....	1054
Verdict may be corrected in form by the court—Surplusage.....	1055
The verdict must settle the status of all the property involved.....	1056
The verdict must respond to all the issues raised, or it is ill.....	1057
The same—Illustrations.....	1058
The verdict may be general if that answers all the issues.....	1059
Effect of a general finding.....	1060
The verdict should find the value of the property.....	1061
An omission to fix the value cannot be corrected by the court.....	1062
The value of each article should be found separately.....	1063
Where impossible to find the separate value it may be found in gross	1064

	SECTION.
Where the finding is in favor of the party in possession value not so important.....	1065
The verdict must describe the property with certainty.....	1066
Indefinite description fatal.....	1067
Illustrations of verdicts which have been upheld.....	1068
Illustrations of verdicts held bad.....	1069
A conditional verdict is always bad.....	1070
Verdicts held bad under plea of <i>non cepit</i>	1071
Where the successful party claims less than a full interest the value of his interest must be fixed.....	1072
The same—Illustrations.....	1073
Verdict for damages not essential.....	1074
Court may compel a finding of nominal damages.....	1075
A verdict may be sufficient to support a judgment of return, but not for value.....	1076
Form of where defense is fraud in vendee's title.....	1077
General form of verdict.....	1078
A verdict may be returned on Sunday.....	1079
Or on a legal holiday.....	1080
Separate defendants are entitled to separate verdicts.....	1081
Finding partly for defendant and partly for plaintiff proper, when.....	1082
Each party may submit special issues to the jury.....	1083
Separate issues must not be united by the verdict.....	1084
A verdict which is inconsistent with itself cannot stand.....	1085

CHAPTER XXXV.

JUDGMENT.

The judgment must follow the verdict.....	1086
The same—Damages must be proved.....	1087
The court may modify the judgment as to damages.....	1088
Judgment may be made to conform to verdict by motion.....	1089
How corrected <i>nunc pro tunc</i>	1090
May be amended saving the rights of third parties—Notice.....	1091
Error in entering judgment, how corrected.....	1092
The proper entry of judgment may be compelled by mandamus....	1093
Power of court over judgment—Fraud.....	1094
Jurisdiction of inferior courts.....	1095
Judgment must be confined to matter properly arising in the replevin suit.....	1096
It is error to render judgment for more than is claimed.....	1097
The judgment must be certain and definite.....	1098
Must describe the property with certainty.....	1099
A judgment which can be made certain by reference to the pleadings is good.....	1100
The judgment must speak upon all the issues involved.....	1101

CONTENTS.

xli

	SECTION.
The judgment must speak as to all the parties	1102
One good count will support a judgment.....	1103
When alternative judgment necessary.....	1104
A judgment in replevin should be in the alternative.....	1105
When alternative judgment not necessary.....	1106
Where bond not given alternative judgment not necessary.....	1107
Successful party may waive right to an alternative judgment.....	1108
How this election made.....	1109
Where property in hands of the court, judgment for delivery alone is sufficient.....	1110
Judgment for a return is necessary where the successful party is not in possession.....	1111
Judgment for a return is a matter of right.....	1112
Insolvency of successful party does not change his right to a return	1113
Return can only be awarded against one in possession.....	1114
The same.....	1115
Exception in case of fraud.....	1116
Where plaintiff fails in his action for any reason restitution should be awarded.....	1117
Judgment of return should follow dismissal.....	1118
The same—A contrary rule.....	1119
An action of replevin cannot be dismissed until the property is dis- posed of.....	1120
Judgment may be rendered for a return of part of the property and damages for the part not taken.....	1121
Judgment of return should fix a reasonable time in which the re- turn is to be made.....	1122
Where the successful party already has possession judgment for a return is not necessary.....	1123
Nor if he has acquired possession during the litigation.....	1124
Nor where the suit proceeds as one for damages only.....	1125
Right of property must be shown to entitle a party to a return....	1126
One who disclaims all interest in the property cannot have a return	1127
One who pleads property in a stranger.....	1128
Where it is impossible that the property should be returned.....	1129
It is error to order the return of property not in existence.....	1130
Effect of death or destruction of property.....	1131
The young of animals born while in litigation.....	1132
Effect of failure to adjudge a return.....	1133
Judgment for value is only proper where a return is awarded.....	1134
Where the property can be returned, the party in possession can not complain of error in fixing the value.....	1135
Where defendant has but a limited interest.....	1136
An officer is entitled to judgment of return where successful.....	1137
Officer only entitled to return where he can sell.....	1138
The same—Exception.....	1139

	SECTION.
An officer may have judgment for a sum larger than the value of the goods.....	1140
Where the amount of the special interest is not found a return should be awarded.....	1141
A joint judgment can only be rendered.....	1142
Joint judgment for defendants who make separate defenses.....	1143
Judgment against a person not a party void.....	1144
Proper judgment in certain cases—Practice.....	1145
Judgment on plea of <i>non cepit</i> and <i>non detinet</i>	1146
An absolute money judgment is erroneous.....	1147
Equities should be adjusted—Damages.....	1148
Proper judgment for damages.....	1149
A stipulation as to the amount of the damages will be enforced by the court.....	1150
Liability and obligations of an administrator.....	1151
Substitution of defendants.....	1152
Substitution of an intervenor.....	1153
Surety on bond may be allowed to prosecute the suit when abandoned by his principal.....	1154
Judgment against the sureties.....	1155
Costs.....	1156

CHAPTER XXXVI.

EFFECT OF JUDGMENT—HOW ENFORCED AND SATISFIED.

Effect of the judgment.....	1157
The same—Illustrations.....	1158
Judgment in replevin settles the right to possession.....	1159
<i>Non cepit</i>	1160
<i>Non detinet</i>	1161
Judgment in replevin, how far conclusive.....	1162
Bar—Estoppel—Former replevin.....	1163
Judgment when a bar—What it is a merger of.....	1164
When conclusive in another replevin action.....	1165
How far binding in other forms of action.....	1166
Does not bar a suit in equity to determine the rights of the parties.....	1167
Title not determined unless strictly in issue.....	1168
Judgment in replevin is binding not only on the parties but on their privies.....	1169
Judgment in replevin a bar to suit for damages between the same parties only.....	1170
Judgment conclusive in federal and sister state courts.....	1171
An officer is liable on his official bond for the judgment against him in replevin.....	1172
A trustee not personally liable.....	1173
The payment of the money judgment vests the title to the property in the defeated party.....	1174

CONTENTS.

xliii

	SECTION.
Of two defendants the one who pays takes the title.....	1175
How enforced.....	1176
How satisfied.....	1177
In conclusion—Summary.....	1178

CHAPTER XXXVII.

WHAT IS A PROPER RETURN OF THE PROPERTY.

<i>Retorno habendo</i>	1179
Officer must take and deliver the property under such an order....	1180
Return not always ordered.....	1181
Duty of party in possession when return is awarded.....	1182
Property should be returned to the custody from which taken.....	1183
What constitutes a return or tender of return.....	1184
What is a proper return under the order—In case of attached property—What officer.....	1185
To whom the property is to be returned on a writ of <i>retorno habendo</i>	1186
Where property has been sold and replaced by other of same kind	1187
The successful party may wait until the property is tendered him	1188
An actual return will alone satisfy the judgment of return.....	1189
And a tender of property must be kept good to have the effect of satisfying the judgment—Sheriff's return conclusive.....	1190
The effect of a return is to satisfy the judgment of return or value	1191

CHAPTER XXXVIII.

DISMISSAL—NONSUIT AND RE-INSTATEMENT.

A nonsuit did not bar another action at common law.....	1192
Plaintiff cannot dismiss to the detriment of the other party.....	1193
The same.....	1194
Neither can he dismiss as to a part of the property if it is claimed by defendant.....	1195
The same.....	1196
But if defendant has retained the property, plaintiff may dismiss..	1197
The rule as to damages on dismissal.....	1198
Where writ is quashed, judgment for return or value is proper.....	1199
But if defendant claim further relief, the plaintiff should be heard before judgment is entered.....	1200
Court should compel plaintiff to prosecute diligently	1201
Defeated party cannot appeal and then dismiss.....	1202
If a nonsuit is the result of an appeal, a return should be awarded	1203
Where plaintiff allows his action to be dismissed, it will not be re-instated.....	1204
Dismissal for defects in the affidavit.....	1205
Judgment of return on nonsuit.....	1206

	SECTION.
When limited to value of special interest.....	1207
On a nonsuit, judge may be compelled to award proper judgment.....	1208
If the court has no jurisdiction, return cannot be awarded.....	1209
If the court has jurisdiction, neither party can dismiss.....	1210
The action should not be dismissed on slight grounds.....	1211
Right to dismiss lost if not acted upon in time.....	1212
Where proceedings in an action of replevin are stayed by injunction.....	1213
Agreement to arbitrate—When a dismissal.....	1214
Defendant may stipulate for a dismissal.....	1215
Effect of judgment for a return.....	1216
Effect of judgment of dismissal.....	1217

CHAPTER XXXIX.

CROSS REPLEVINS, SECOND REPLEVINS, AND RECAPTION.

Distinction between the writ of replevin and other writs.....	1218
Where the property is held by a special writ for that identical property, it cannot be replevied.....	1219
Judgment in trial of the right of property has the same effect.....	1220
The issues made and tried in replevin are <i>res adjudicata</i>	1221
The pendency of another action for the same property in same court is a good defense.....	1222
Former replevin may be pleaded in bar of the second suit.....	1223
Consolidation of the two actions is error.....	1224
Cross replevins are not allowed.....	1225
Illustrations of cross replevins—Definition.....	1226
And this inhibition extends to grantees of the defendant.....	1227
Second replevins—Definition.....	1228
On the discontinuance of an action in replevin, another one may be brought.....	1229
A nonsuit is not now a bar to a new action.....	1230
Recaption—Definition.....	1231
Replevin may be brought against a party in replevin who has just taken it in replevin.....	1232
It may be brought against the plaintiff.....	1233
A stranger to the first action of replevin may bring replevin for the property.....	1234
Judgment for damages or for other property is not a bar to the second replevin.....	1235

CHAPTER XL.

ERROR AND APPEAL.

General principles.....	1236
Proceedings in error or appeal must be by the real party in interest.....	1237

CONTENTS.

xlv

SECTION.

Joint parties should join in proceedings to vacate or modify the judgment	1238
Pleadings may be amended even after judgment	1239
Practice in error cases in replevin—Illustrations.....	1240
The same—Waiver of right to error	1241
Error from judgment of dismissal	1242
Presumption in favor of correct assessment of damages by the jury	1243
What defects are waived by appeal—Practice on appeal.....	1244
Defense cannot be changed upon appeal.....	1245
How appealable value determined.....	1246
After appeal taken the judgment is held in abeyance	1247
When return will be awarded in appellate court.....	1248
Appeal does not open a judgment in appellant's favor for part of the property.....	1249

PART III.

QUESTIONS ARISING IN THE PROSECUTION AND DEFENSE OF AN ACTION ON THE REPLEVIN BOND.

CHAPTER XLI.

WHAT CONSTITUTES A BREACH, AND WHEN RIGHT OF ACTION ACCRUES ON THE BOND.

What constitutes a breach	1250
The condition to prosecute without delay.....	1251
What is an unusual delay.....	1252
The condition to prosecute with effect.....	1253
The same.....	1254
Dismissal on ground of no jurisdiction is a breach.....	1255
Voluntary nonsuit is a breach of this obligation.....	1256
Failure to enter the suit in court is a breach.....	1257
A contrary rule held where the "court" was absent.....	1258
Where the suit abates by removal of the court, bond not liable....	1259
Failure in the suit is a breach of this condition.....	1260
Failure by death, or other act of God.....	1261
The obligors may limit their liability to the successful trial in justice court.....	1262
But ordinarily, the obligation refers to the final determination....	1263
The replevin action must be finally ended, or suit on bond will be enjoined.....	1264

	SECTION.
Breach of the condition to return.....	1265
Demand for return not necessary	1266
The judgment of return in replevin is conclusive on the sureties	1267
The failure to pay money judgment or costs is a breach.....	1268

CHAPTER XLII.

ACTION ON BOND—HOW BROUGHT.

Debt is the proper form of action on the bond.....	1269
What facts are material to be alleged	1270
The same.....	1271
Copies of pleadings in replevin are no part of the petition.....	1272
One cause of action well stated is sufficient.....	1273
Proper and improper allegations—Illustrations.....	1274
The same.....	1275
The same—Illustrations—In regard to return and demand thereof	1276
Allegations by officer or other party having only a special interest	1277
Malice need not be alleged.....	1278
Bond executed in wrong name, how sued.....	1279
Defect apparent on face of bond after <i>oyer</i> may be reached by de- murrer.....	1280
In variance between bond and petition, recitals of bond will govern	1281

CHAPTER XLIII.

VALIDITY AND CONSTRUCTION OF BONDS.

A bond in replevin will be construed liberally for the purpose for which it was given.....	1282
The same—Illustrations.....	1283
The delivery of the property to the plaintiff in replevin is a suffi- cient consideration	1284
That the bond never was delivered is a good defense.....	1285
Bond may be valid though not signed.....	1286
If the bond is good at common law, a recovery may be had thereon	1287
Replevin bonds not dated, date from their delivery.....	1288
Bonds taken under repealed law are void.....	1289
Surety not mentioned in body of bond—Mistake in name in body of bond—Not fatal.....	1290
But if defendant in replevin take advantage of such error to dis- miss the action, he cannot then ask to recover on the bond....	1291
Void bonds—Illustrations.....	1292
Disability of one surety does not release the co-obligors on the re- plevin bond.....	1293

CONTENTS.

xlvii

CHAPTER XLIV.

PROPER PARTIES.

	SECTION.
Who are proper parties to a suit on the replevin bond.....	1294
Suit by officer for use, etc.....	1295
Suit by usee in name of sheriff.....	1296
An action on a replevin bond should be brought in name of real party damaged.....	1297
A stranger cannot maintain an action.....	1298
Statute of limitations to suit on bond.....	1299
Right of assignee of judgment to sue on bond.....	1300
A substituted plaintiff may bring the suit in his own name, on the proper averments.....	1301
How brought in cases depending upon particular facts—Illustrations.....	1302
All parties interested may join in suit on bond.....	1303
Joint obligees should join in suit on bond.....	1304
Suit on bond may be brought in any court of competent jurisdiction.....	1305
Procedure in case of lost bond.....	1306

CHAPTER XLV.

LIABILITY OF PRINCIPAL AND LIABILITY AND RIGHTS OF SURETIES ON THE BOND.

Liability of principal.....	1307
How courts regard the liability of sureties to replevin bonds.....	1308
Sureties' liability can not be greater than the principal's.....	1309
A release to the principal will discharge the sureties.....	1310
There must be judgment against the principal.....	1311
The waiver of judgment for return and taking a money judgment releases the sureties.....	1312
The sureties cannot contradict or question the judgment against their principal.....	1313
Sureties are bound by the judgment rendered in the replevin action.....	1314
Judgment by confession or by agreement for a less amount than that claimed, if in good faith, is binding on the sureties.....	1315
Sureties are not bound by a judgment rendered by collusion or fraud.....	1316
Judgment may be entered in the replevin action against the sureties only where the statute so provides.....	1317
The obligations of the sureties will not be enlarged by the courts.....	1318
The liability is fixed by law and cannot be changed or released without the consent of the obligee.....	1319
The liability of the surety must be determined by the law in force at the time it was assumed.....	1320

	SECTION.
'The sureties' obligation only covers the default of their principal when the suit takes its ordinary legal course, and he is cast in the replevin action	1321
It is no breach where the liability arises after the successful termination of the suit.....	1322
Subsequent surrender of the property by the officer to whom it is returned releases.....	1323
Where the property pending the litigation is taken and disposed of legally, it releases the sureties.....	1324
Value at date of trial and damages the extent of their liability.....	1325
The sureties are not liable for damages which accrued prior to the judgment for a return.....	1326
Effect of a compromise with a part of the sureties.....	1327
Judgment in favor of the plaintiff on first trial as to all, and defeat as to one, defendant on retrial does not release the sureties	1328
But sureties will not be released on any frivolous pretext—Illustrations	1329
Sureties cannot contradict the recitals of their bond.....	1330
Change in character in which plaintiffs sue and addition of other plaintiffs will not release the sureties.....	1331
A legal change of defendants does not release the sureties.....	1332
Effect of agreement to delay or neglect to enforce claim on bond...	1333
A discharge in bankruptcy is no defense.....	1334
Voluntary payment by surety cannot be recovered back from principal	1335
Contribution and subrogation	1336
If sureties pay the judgment they are entitled to the property.....	1337

CHAPTER XLVI.

PROPER MEASURE OF RECOVERY IN SUIT ON BOND.

The measure of damages should be compensation.....	1338
The same—Illustrations	1339
Loss from interruption of business should be recovered in the replevin action.....	1340
Vindictive and punitive damages are not recoverable	1341
In justice court the damages are not limited by the jurisdiction of the justice.....	1342
Limit of damages recoverable—Illustrations	1343
The value found in the replevin suit with interest is a proper item of recovery on the bond	1344
Interest on the value should be allowed	1345
Where value not found in the replevin suit, actual value allowed...	1346
Measure where property attached to real estate and mortgaged and not actually taken possession of.....	1347
Rule in replevin of attached property.....	1348

CONTENTS.

xlix

	SECTION.
Damages, how determined—Limit.....	1349
Where part of the goods is returned injured.....	1350
In case of distress.....	1351
Measure of damages, suit by one having special interest only.....	1352
In case of partners.....	1353
As between mortgagee and mortgagor.....	1354
Where only nominal damages will be allowed.....	1355
Where suit dismissed.....	1356
Rule of damages in suit on delivery bond.....	1357
Costs of court and of retaking the property and attorney's fees....	1358
Interest on the penalty of the bond may be allowed when needed..	1359

CHAPTER XLVII.

DEFENSES TO SUITS ON REPLEVIN BOND.

What defenses are proper to suit on the bond.....	1360
What defenses may be set up.....	1361
Any material alteration in bond is a good defense.....	1362
The judgment in replevin is conclusive as to all matters properly triable in that action.....	1363
Matters litigated in the replevin suit cannot be retried in the suit on the bond.....	1364
Property in a stranger is no defense to suit on the bond.....	1365
The obligors are estopped from alleging irregularities back of the judgment in replevin.....	1366
The same—Illustrations.....	1367
Defects in the replevin proceedings are of no avail in the suit on the bond.....	1368
Where the replevin suit was not tried on its merits more latitude is allowed in making defense.....	1369
The same.....	1370
<i>Per contra</i>	1371
The plea must answer all the material allegations of the petition..	1372
The same—Illustrations.....	1373
Pleas held not good under certain circumstances.....	1374
Satisfaction, no judgment, release, are all good defenses.....	1375
That the property has been <i>eloigned</i> or ceased to exist or died— How far a defense.....	1376
That it cannot be returned no defense.....	1377
What may be shown in mitigation of damages.....	1378
Rule against a stranger to the title is more strict.....	1379
Matters in mitigation of damages—Illustrations.....	1380
That the plaintiff has been partly paid in another proceeding is a defense <i>pro tanto</i>	1381
The same.....	1382
Set-off may be allowed in suit on bond.....	1383

	SECTION.
Illustrations of matter not allowed to be shown in mitigation of damages.....	1384
Evidence—In certain cases—Illustrations.....	1385
The judgment and pleadings in the replevin case are competent evidence in the suit on the bond	1386
A party in his suit on the bond must occupy a position consistent with his position in the replevin suit.....	1387
A return to be a full defense must fully comply with the order of the court.....	1388
A return of part of the property is a defense <i>pro tanto</i>	1389
New title acquired since the bond was given and before the judgment in replevin no defense— <i>Res adjudicata</i>	1390
Effect of a return after suit brought on bond.....	1391
It is a good defense that plaintiff had the possession of the property	1392
Damages for failure to return should be recovered from the replevin and not from the appeal bond.....	1393
In an action for the malicious prosecution of a replevin suit.....	1394

PART FIRST.

QUESTIONS ARISING IN PREPARING TO COM-
MENCE A REPLEVIN ACTION.

CHAPTER I.

HISTORICAL AND INTRODUCTORY.

	Section.		Section.
History	1	Replevin in the old forms is un-	
Derivation and definition	2	known in this country	8
A writ of justice	3	But are still recognized, though	
One of the modes of redress for		not in name	9
the loss of goods	4	At common law replevin in the	
Both parties are actors	5	<i>cepit</i>	10
Old forms of the action	6	Common law replevin may be	
Practice	7	extended or limited by prac-	
		tice acts	11

§ 1. **History.** Replevin is among the earliest remedies given by the common law. As far back as we have any written history we find replevin spoken of. The action originally lay for the purpose of recovering chattels taken as a distress, but has acquired a much more extended use. In England and most of the states of the United States it extends to all cases of illegal taking, and in some states it may be brought wherever a person wishes to recover specific goods to which he alleges title. It, like other forms of action, probably grew out of a pressing demand for a remedy for a specific evil which had become so oppressive that it could be borne no longer. The immediate circumstance which gave rise to the introduction of this form of action was undoubtedly the oppressive use of the right of distraint by avaricious landlords. (See Chapter III.) It is first treated of under the head of distress. All of the early writers treat it under this title. It makes its first appearance and is first spoken of as a separate action near the close of the twelfth or commencement of the thirteenth century, but for a long time after that was considered in connection with distress. Its first appearance as part of the

lex scripta is in the Statute of Marlbridge, 52 Henry III., which would be in 1267. Its history for the first five centuries is but a panoramic view of the struggles between the barons and feudal lords on the one hand and the common people on the other, the lords trying to narrow the scope of the replevin process, and the common people seeking to enlarge and extend it. With the increase of personal property holdings and the advancement of intellectual culture, the limits and obstructions thrown around the writ when it was at first reluctantly allowed have been one by one broken down, until to-day they are only known in history. And the writ as used to-day, though one of the oldest writs known to the law, is just as much a matter of statute in its practical use and application, as writs which were created by statute—with this difference, that while statutory writs are said to be in derogation of the common law, and the cases to which they apply must, therefore, be strictly limited to those covered by the legislative intent, the writ of replevin is a common law remedy, and statutory enactments in regard thereto are said to be in aid of the common law, and therefore the cases to which such enactments apply will be extended rather than restricted. For a more extended historical review, the reader is referred to the common law writers and Reeves' History of English Law, Vol. II., 308, and for conduct of a replevin suit, Vol. III., 282. This tendency to enlarge the scope of the writ still exists, as is shown by recent legislative enactments and judicial constructions. In some states to-day, an action of replevin may develop into a suit for damages pure and simple. In others, an action started to replevin personal property may be transformed into an equitable action to determine the title to the land, which produced the personal property.¹ And in many states it may now be used to try the title as well as the right of possession of personal property. So

¹ Rogers v. Kerr, 42 Ark. 100.

that, all things considered, it is the most important form of action known to our system of jurisprudence.¹

§ 2. **Derivation and definition.** The most probable etymology is that of Diez,² who derives the phrase *plevir la fey* (Cf. *plevine par sa fey*, Britt. 180 a) to pledge one's word, afterwards shortened into *plevir*, from *præbere fidem*, pleige from *præbium*. Replevin, therefore, is regaining possession by giving security (*plevine*).³ The word means a redelivery of the pledge or thing taken in distress to the owner by the county court registrar, upon the owner giving security to try the right of distress, and to restore it if the right be adjudged against him.⁴ Replevin consists in the redelivery of the goods taken to the owner.⁵ The name of one of the common law actions, the distinguishing features of which are that it is brought to obtain possession of specific chattel property, and is prosecuted by provisional seizure and delivery to plaintiff of the thing in suit.⁶ Replevin is a personal action *ex delicto*, brought to recover possession of goods unlawfully taken, the validity of which taking it is the regular mode of contesting. The word means a redelivery of the pledge or thing taken in distress.⁷ The term "replevy" means to redeliver goods which have been distrained to the original possessor of them, on his giving pledges.⁸ Property is said to be repleviable or replevisable when proceedings in replevin may be resorted to for the purpose of trying the right to such property.⁹

§ 3. **A writ of justice.** Replevin is a justicial writ to the sheriff, complaining of an unjust taking and detention

¹ For history of the writ, see Chap. XXIII.

² 2 Grimm, 401.

³ Co. Litt. 145 b.

⁴ Wharton Law Dictionary; Abbott's Law Dictionary.

⁵ Hastings on Torts, 157.

⁶ *Pierce v. Hill*, 9 Port. (Ala.) 151; *Brooke v. Berry*, 1 Gill (Md.), 153; *Marston v. Baldwin*, 17 Mass. 609; *Paul v. Luttrell*, 1 Col. 317.

⁷ Wharton Law Dictionary; Wells' *Res Adjudicata*, § 360.

⁸ *Kirk v. Morris*, 40 Ala. 229.

⁹ *Galloway v. Bird*, 4 Bing. 299; *Mennie v. Blake*, 6 El. & B. 842.

of goods or chattels, commanding the sheriff to deliver back the same to the owner, upon security given to make out the injustice of such taking, or else to return the goods and chattels.¹ It was a writ of right, not of grace or favor, under the common law.²

§ 4. **One of the modes of redress for the loss of goods.** By the ancient law of England there existed four different modes of redress for the loss of goods: by appeal of robbery (in which restitution as well as punishment for the felony was awarded), by writ of replevin, by writ of trespass, and by writ of detinue. But these proceedings were not adequate for relief in all cases. The appeal of robbery availed only when goods had been feloniously taken, and the writ of replevin was applicable only in cases of distress.³

§ 5. **Both parties are actors.** A replevin is a civil suit or action, in which both parties are actors, and in cases of rent, the avowant is the principal actor.⁴

§ 6. **Old forms of the action.** In England the action in the progress of its development assumed three forms—*Cepit* from the Latin *cipio*, “to take,” where the action was simply for the wrongful taking. *Detinet*, from *de* and *teneo*, “to hold,” where the action was for a wrongful holding. If the goods were not taken on the writ by the officer, the action proceeded as replevin *in the detinet*, but if the goods were taken, the action was called replevin *in the detinuit*, the first meaning “he detains,” the second “he detained.” The action in the *detinet* has long fallen into disuse, and is never brought unless the distrainor has eloigned the goods, so that they cannot be got at to make replevin.⁵

§ 7. **Practice.** The registrar of the county court now grants the replevin, approves of the replevin bonds, and is-

¹ Williamson v. Ringgold, 4 Cranch (U. S. C. C.) 42.

² Anon 2 A. T. K. 237; Chadwick v. Miller, 6 Iowa, 34.

³ 3 Black. Com. 146.

⁴ Rae v. McCrea, 1 Ashm. (Pa.) 17.

⁵ Fox v. Pritchett, 5 Vroom (N. J.) 13; Truitt v. Revill, 4 Harr. (Del.) 71; Potter v. North, 1 Sand. 347 b, note 2. Petre v. Duke, Lutw. 360.

sues all necessary process in relation thereto, which is executed by the high bailiff of the county court. The replevin is granted at the instance of the party whose goods are distrained, who is called the replevisor, who must give security for prosecuting the action. The security must be of sufficient amount to cover the alleged rent or damage in respect of which the distress shall have been made, and the probable costs of the cause; and to make a return of the goods, if a return shall be adjudged. The action, if intended to be commenced in a county court, must, according to the conditions of the bond, be commenced within a month; if in a superior court, then within a week. In the latter case the replevisor further undertakes to prove before the court in which the action is brought that he had good ground for believing that the title to some corporeal or incorporeal hereditament, or to some toll, fair, market, or franchise was in question, or that the rent or damages exceeded £20; in other words, that the facts were such as to exclude the jurisdiction of the county court. When the action is brought, the defendant must appear to the writ as in ordinary cases. The plaintiff's declaration states in general terms the taking of the goods. If the defendant insists that the goods were lawfully taken by him in his own right, the pleading is called an avowry; if in the right of another, it is called a cognizance. He may claim also a return of the goods; so that both parties are regarded as actors, or claimants seeking redress. The plaintiff's next pleading is called a plea in bar, and that of defendant a replication, and so on.

The judgment, if for the plaintiff, awards damages for the unlawful taking; if for the defendant, it is that he have a return of the goods taken; and if the distress was for rent, he recovers the amount of arrears in damages. If the action be in the county court, it is tried in the same way as other actions in county courts.¹

¹ Abbott's Law Dictionary; *Terms de la Ley*; Cowel; 3 Black. Com.

§ 8. Replevin in the old forms is unknown in this country. But statutory replevin has followed one form in some states, while in other states it has patterned more after some other form. "Replevin in the *cepit* resembles the old trespass *vi et armis*, and only puts the taking in issue; replevin in the *detinet* is a substitute for the old action of *detinue*, where the injury is only in the keeping, the taking not having been wrongful."¹

§ 9. But are still recognized, though not in name. Although the technical action of replevin has been abolished by statutes in many of the states, and, strictly speaking, can not be said to exist in any of them, an action for the recovery of specific personal property is recognized in nearly all of them, and, generally, all the remedies formerly secured to parties by the action of replevin and trover may be had in a single action of replevin or its statutory equivalent under another name, to recover a chattel, or its value, and damages for its detention.²

§ 10. At common law, replevin in the *cepit* would not lie against one who came into possession of property under a contract, express or implied, or where he came rightfully into the possession of the chattel, the remedy in such cases being

145-151; 3 Steph. Com. 420-423; Lush. Prac. 1013-1026; Fawcett L. and T. 176-178; Harwood v. Smethurst, 5 Dutch. (29 N. J. 203); Pierce v. Van Dyke, 6 Hill, 613; Oleson v. Merrill, 20 Wis. 462; Cummings v. Vorce, 3 Hill, 282.

¹ Ronge v. Dawson, 9 Wis. 246.

² Eldridge v. Adams, 54 Barb. 417; Collins v. Hough, 26 Mo. 152; Chadwick v. Miller, 6 Iowa, 34. It is unknown in Louisiana, where the civil law prevails. It never was recognized in Alabama. Smith v. Crockett, Minor (Ala.), 277; Peirce v. Hill, 9 Porter (Ala.), 155. In Mississippi was formerly not recognized. Wheelock v. Cozzens, 6 How. (Miss.) 281, and is used but little. In Virginia it was abolished by statute. Nicholson v. Hancock, 4 Hen. & M. (Va.) 491; Vaiden v. Bell, 3 Rond. (Va.) 448. In Connecticut, Vermont, and South Carolina it was only allowed for a distress up to a recent period. Watson v. Watson, 9 Conn. 140; Id. 10 Conn. 75; Glover v. Chase, 27 Vt. 533; Hewitson v. Hunt, 8 Rich. (S. C.) 106. In Connecticut, under the statutes of 1821, replevin existed only in favor of an owner of chattels. Brown v. Chickopee Falls Co., 12 Conn. 87.

by trover or assumpsit,—nor for property sold for taxes, though a portion of them was illegal,¹ but the scope of the writ is now much broader by statute.

§ 11. **Common law replevin** may be extended or limited by the statute,² and in Iowa it is held that the provisions of the Iowa code are not the whole of the law of replevin; the common law still contains the body and substance of the action.³

¹ *Bonsall v. Comby*, 44 Pa. St. 442; *Emerick v. Sloan*, 18 Ia. 139.

² *Stapleford v. White*, 1 Houst. (Del.) 238.

³ *Chadwick v. Miller*, 6 Ia. 34.

CHAPTER II.

SCOPE AND NATURE OF THE ACTION.

	Section.		Section.
The gist of the action . . .	12	Replevin as used in America . .	19
It is not an extraordinary remedy like attachment . . .	13	Importance of the action . . .	20
A court of chancery will not interfere	14	It is a mixed action partly <i>in rem.</i> and partly <i>in personam</i> , . .	21
Replevin: suits in; how regarded by the courts . . .	15	The action is grounded on a tortious taking	22
Replevin is strictly a law action, .	16	Object of the action, primary, . . .	23
Distinction at common law between trespass, trover, and replevin	17	secondary,	24
Similarity of trespass, trover, and replevin	18	Scope of the investigation . . .	25
		The same; illustrations	26
		Replevin is strictly a possessory action	27

§ 12. The gist of the action is the wrongful detention and not the original taking.¹ The gist of this action, without which it is not maintainable, is an unlawful detention of property.² The gist of the action of replevin is plaintiff's right to the immediate possession of the property at the commencement of the action.³ In this respect our replevin is the same as the common law action of detinue, and differs from the common law action of replevin.⁴

§ 13. It is not an extraordinary remedy, like attachment. The action of replevin is not an extraordinary remedy in derogation of the common law, like the proceeding

¹ Phillips v. Schall, 21 Mo. App. 38; Metton v. McDaniel, 2 Mo. 45; Pilkington v. Trigg, 28 Mo. 95; Rowe v. Hicks, 58 Vt. 18 (4 Atl. 563).

² Cool v. Roche, 15 Neb. 27 (17 N. W. 119).

³ Haggard v. Wallen, 6 Neb. 272; Moore v. Kepner, 7 Neb. 294; Blue Valley Bank v. Bane, 20 Neb. 294 (30 N. W. 64).

⁴ Wetson v. Fuller, 9 Kan. 176.

by attachment, and the law governing the same should be liberally construed in the interest of justice.¹

§ 14. **A court of chancery will not interfere** with the conduct of a replevin suit nor take any action which would tend to decide the questions legitimately raised in the replevin action already pending between the same parties.²

§ 15. **Replevin: Suits in; How regarded by the courts.** Suits in replevin are said to be, in some respects, *sui generis*; and the inclination of the courts has been to give them a flexibility sufficient to meet exigencies and adjust all equities arising in such actions.³

§ 16. **Replevin is strictly a law action**, in which the right of recovery must exist at the time the action is commenced. It cannot be created by bringing into court money or notes as in an equitable suit for rescission, and offering to surrender or pay, as the court may direct.⁴ It is a civil action subject to the same rules as other civil actions.⁵

§ 17. **Distinction at common law between trespass, trover, and replevin.** At common law, the distinction between the technical action of trespass, trover, and replevin may be briefly stated as follows: To maintain trespass it was essential to aver and prove that there was a wrongful act *vi et armis*, or a taking *de bonis asportatis*; in trover for a conversion, the taking may have been lawful, as by finding or by consent of the plaintiff, the gist of the action being for the unlawful conversion; the action of replevin was a form of action to recover the possession of specific chattels wrongfully taken from the plaintiff. The actions of trespass and trover were for damages, the former for the unlawful taking, and the amount of damages depended more or less upon

¹ *Martinez v. Martinez*, 2 N.M. 464.

² *Miller v. White*, 14 Fla. 435; See *Hopkins v. Drake*, 44 Miss. 619.

³ *Hickman v. Dill*, 32 Mo. App. 509; *Boutelle v. Warm*, 62 Mo. 350; *Barney v. Brannon*, 51 Conn. 175.

⁴ *Thompson v. Peck*, 115 Ind. 512 (18 N.E. 16); *Moriarty v. Stofferan*, 39 Ill. 528.

⁵ *Latimer v. Motter*, 26 Ohio, St. 480.

the circumstances attending the taking; and if for chattels, *de bonis asportatis*, the damages would not be less than the value of the property; whereas in trover, damages were not on account of the wrongful taking, or the manner in which the possession was acquired, but only for the conversion, and the usual measure of damages was the value of the converted property, with interest from the time of the conversion. In replevin there was no claim for damages as such, but only for the immediate possession of the property. This delivery of the property on the first process is one of the main differences between replevin and other forms of action. In trespass and trover the property was never delivered to plaintiff. If successful, the fruit of his victory was only an ordinary judgment for so much money.¹ Replevin, too, can be used under circumstances under which the other forms of action could not. Thus a simple omission or refusal to deliver goods rightfully in one's possession would not furnish ground for an action of trespass, but might furnish ample ground for replevin.² Trespass will not lie against one who came rightfully into the possession of the goods of another, even though it should turn out that the party who delivered them to him was a wrongdoer. Or where a bailee of goods sells and delivers them without authority, such sale and delivery conveys no title to the purchaser; and replevin would lie, but trespass could not be maintained.³ Or if an infant sell and deliver property, he can avoid the sale and bring replevin, but trespass will not lie.⁴ The defendant must have the actual or constructive possession at the commence-

¹ 3 Black. Com. 152; Robinson v. Richards, 45 Ala. 358; Badger v. Phinney, 15 Mass. 362; Cox v. Morrow, 14 Ark. 608; Sedgwick on Meas. of Dam. II., 440.

² Isaacs v. Clark, 2 Bulst. 310; Grace v. Mitchell, 31 Wis. 536.

³ Barrett v. Warren, 3 Hill (N. Y.), 348; Wilson v. Barker, 4 Barn. & Adol. (24 E. C. L.) 614; Marshall v. Davis, 1 Wend. 109; Nash v. Mosher, 19 Wend. 431.

⁴ Fonda v. Van Horn, 15 Wend. 631; Roof v. Stafford, 7 Cow. (N. Y.) 179; and note.

ment of the action, or replevin will not lie, but he might be liable in trespass without having possession.¹ Where one takes forcible possession of his own goods, he may be liable as a trespasser, but not in replevin; having the right of possession at the time of the seizure, his trespass does not debar him from the right of possession, nor vest the other party with the right to replevy the goods.² Judge Coleridge once said: "Replevin at common law is distinguished from "trespass in this, among other things, that while the latter "is intended to procure compensation in damages for goods "wrongfully taken out of the actual or constructive possession of the plaintiff, the object of the former action is to "procure the restitution of the goods themselves, and it "effects this by a preliminary *ex parte* interference by the "officers of the law with the possession. * * * As a "general rule, it is just that a party in the peaceable possession of goods should remain undisturbed, either by "parties claiming adversely, or by the officers of the law, until "the right be determined and the possession shown to be "unlawful; but where, either by distress or by merely a "strong hand, the peaceable possession has been disturbed, "an exceptional case arises, and it is thought just that even "before any determination of the right the law should interfere to place the parties in the condition in which they were "before the act was done, security being taken that the right "shall be tried and the goods forthcoming to abide the decision."

¹ Lathrop v. Cook, 2 Shep. (14 Me.) 415; Richardson v. Reed, 4 Grey, 443; Hickey v. Hinsdale, 12 Mich. 100; Ramsdell v. Buswell, 54 Me. 546; Grace v. Mitchell, 31 Wis. 533; Copley v. Rose, 2 Comst. 115; Mitchell v. Roberts, 50 N. H. 486.

² Taylor v. Welbey, 36 Wis. 42; Hurd v. West, 7 Cow. 753; Spencer v. McGowen, 13 Wend. 256; Coverlee v. Warner, 19 Ohio, 29; Marsh v. White, 3 Barb. 518; Collomb v. Taylor, 9 Humph. (Tenn.) 689; Owen v. Boyle, 22 Me. 67; Hedgesden v. Hubbard, 18 Vt. 504; Bogard v. Jones, 9 Humph. (Tenn.) 739; Neely v. Lyon, 10 Yerg. (18 Tenn.) 473; Carroll v. Pathkiller, 3 Porter (Ala.), 279.

§ 18. **Similarity of trespass, trover, and replevin.** It may assist some in understanding the law applicable to the action of replevin to consider it as belonging to the same class as trespass and trover, and only differing from them in the mode of procedure and the character of the result obtained; but with all this difference in their governing principles the actions are essentially the same.¹ Trover supposes a casual loss by the plaintiff and a finding and conversion by the defendant,² while replevin supposes only a right of possession in plaintiff and a wrongful detention by defendant.³ Trespass lies for any unauthorized interference with the property of another. But to sustain an action in trover, the interference must amount to a conversion. In other respects the actions are similar.⁴ Detinue was for the detention, and supposed a bailment of the goods by the plaintiff to the defendant, and a refusal to deliver them after proper request.⁵ Replevin is based on the supposition that plaintiff has a general or special property in the goods in dispute and a right to their immediate possession, and that defendant stands in the way of the exercise of this right.⁶

¹ *Marshall v. Davis*, 1 Wend. 109; *Holbrook v. Wight*, 24 Wend. 169; *Rector v. Chevalier*, 1 Mo. 345; *Briggs v. Gleason*, 29 Vt. 78; *Rogers v. Arnold*, 12 Wend. 30; *Heard v. James*, 49 Miss. 236; *Chapman v. Andrews*, 3 Wend. 242; *Wickliffe v. Sanders*, 6 T. B. Mon. (Ky.) 296; *Sanford v. Wiggin*, 14 N. H. 441; *Sawtelle v. Rollins*, 23 Me. 196; *Rowell v. Klein*, 44 Ind. 294.

² 3 Black. Com. 151.

³ *Ward v. Macauley*, 4 T. R. 260, 488; *Burdick v. McVanner*, 2 Denio, 171; *Heyland v. Badger*, 35 Cal. 404; *Carlisle v. Weston*, 1 Met. (Mass.) 26; *Waterman v. Robinson*, 5 Mass. 304.

⁴ *Price v. Helyer*, 4 Bing. 597.

⁵ 3 Black. Com. 155; *Lawson v. Lay*, 24 Ala. 188; *Schulenberg v. Campbell*, 14 Mo. 491; *Y. B.*, 6 H. 7, 9; *Fitz*, N. B. 323; *Selw. N. P.* 657.

⁶ *Hunt v. Chambers*, 1 Zab. (21 N. J.) 624; *Mennie v. Blake*, 6 Ell. & B. (88 E. C. L.), 850; *Drummond v. Hopper*, 4 Harr. (Del.) 327; *Watson v. Watson*, 9 Conn. 140; *Vaiden v. Bell*, 3 Randolph, 448; *Chinn v. Russell*, 2 Blackf. 176, note 3; *Ramsdell v. Buswell*, 54 Me. 548; *Miller v. Sleeper*, 4 Cush. 370; *Wheelock v. Cozzens*, 6 How. (Miss.) 280; *Smith v. Huntington*, 3 N. H. 76; *Pirani v. Barden Pike*, (5 Ark.) 84; *Neff v. Thompson*, 8 Barb. 215.

§ 19. **Replevin is the remedy which in America may** be used by a person in almost all cases in which chattels are unlawfully taken from him; but it is not often used in England, except in cases of wrongful distress for rent or stock taken *damage feasant*, when it is brought for the purpose of trying the legality of the distress; it may also be used to decide a question of title to land or other hereditaments under the English practice. In the code states the old common law action of replevin has been abolished, and the provisional remedy, claim and delivery, is in use. But even in these states the name replevin is still in use for want of a better nomenclature.¹

§ 20. **Importance of the action.** It is the only remedy for settling the right of possession of specific chattels.² When we consider that the greater part of the wealth of the world is in personal property, we see at once the importance of this action. Both the legislatures and the courts have recognized its importance; and through their aid, what was in its origin a half civilized contest, in which brute force was a prominent factor, has grown and developed, with the growth and development of civilization, into an ever ready instrument for the solving of the intricate problems arising out of the possession and ownership of such vast wealth. The peculiarities of the action also render it important. It is the only form of action where, on an *ex parte* showing by affidavit, the property, thing in controversy, is placed in the care of the plaintiff at the commencement of the litigation.³ For this reason the remedy has frequently been called a violent one, but the frequency with which it is appealed to and the fact that the tendency of both the courts and the legislatures, for the last 100 years, has been to enlarge rather than restrict the scope of the

¹ Repalje & Lawrence's Law Dic.

² Corbitt v. Brong, 44 Mich. 150 (6 N. W. 213).

³ Hunt v. Chambers, 1 Zab. (N. J.) 624; Yates v. Fassett, 5 Denio, 31; Kingsbury's Exrs. v. Lane's Exrs., 21 Mo. 117; Creamer v. Ford, 1 Heisk. (Tenn.) 308; Lowry v. Hall, 2 W. & S. (Pa.) 129.

action, shows not only that no evil effect has followed this feature of the action, but also shows its importance and necessity.¹

§ 21. It is a mixed action, partly in rem and partly in personam, wherein the plaintiff seeks to recover the thing detained *in specie*, and not as in trespass or trover, damages for its detention.² In Pennsylvania, replevin is not altogether a proceeding *in rem*, but against the defendant in the writ personally, with a summons to appear.³ Replevin in its inception is a mixed action. It is a demand for the thing itself, and also for damages for the taking and detention.⁴ The action of replevin is not one *in rem*, and to give jurisdiction over the person he must be a party.⁵ So far as the action seeks an order in regard to the disposition of the property itself, it is an action *in rem*, and seizure of the property gives jurisdiction. But so far as it seeks judgment against the defendant for damages, it is an action *in personam*, and service on the person is necessary to a valid judgment.⁶ In a replevin suit, where the property is not seized

¹ Tibball v. Cahoon, 10 Watts. 232; Pettygrove v. Hoyt, 11 Me. 66; Mennie v. Blake, 6 Ell. & Bla. (88 E. C. L.) 849; Badger v. Phinney, 15 Mass. 362; Town v. Evans, 1 Eng. (Ark.) 263; Ames v. Miss. Boom Co., 8 Minn. 467; Kingsbury's Exrs. v. Lane's Exrs., 21 Mo. 117; Hunt v. Chambers, 21 N. J. 624; Clark v. Skinner, 20 Johns. 467; Travers v. Inslee, 19 Mich. 101; Weaver v. Lawrence, 1 Dall. 156; Hutchinson v. McClellan, 2 Wis. 17; Tift v. Verden, 11 S. & M. (Miss.) 160. Imprisonment is sometimes allowed. Tomlin v. Fisher, 27 Mich. 525.

² Mitchell v. Roberts, 50 N. H. 486; Turner v. Lilly, 56 Miss. 576; Fisher v. Whoollery, 25 Pa. St. 197; Herdic v. Young, 55 Pa. St. 176. See Bigelow on Estoppel (4 Ed.), 46, 47, and 225.

³ Bower v. Tollman, 5 Watts & S. 556.

⁴ Fisher v. Whoollery, 25 Pa. St. 197.

⁵ Waite v. Tribblecock, 5 Dill. (8th Cir. Iowa) 547.

⁶ Bower v. Tollman, 5 W. & S. (Pa.) 561; Brown v. Smith, 1 N. H. 38; Wheeler v. Train, 4 Pick. 168; Fletcher v. Wilkins, 6 East. 283; Sharp v. Whittenhall, 3 Hill (N. Y.), 576; Lowry v. Hall, 2 W. & S. (Pa.) 132; Baldwin v. Cash, 7 Watts & S. 425; Eaton v. Southby, Willes, 131; Burr v. Daugherty, 21 Ark. 559; Doggett v. Robins, 2 Blackf. (Ind.) 416; Stevens v. Tuite, 104 Mass. 332; Ramsdell v. Buswell, 54 Me. 547; St. Martin v. Desnoyer, 1 Minn. 41.

upon the writ, and the plaintiff proceeds for its value, the suit becomes essentially a personal action, and is governed by the same principles as an action of trover for the conversion of the property.¹ In Kansas it is not necessary that the property be seized or that an order of delivery be taken out. The statute says that plaintiff *may* have the order of delivery when he commences the suit or at any time before answer on giving bond, etc.²

§ 22. **The action is grounded on a tortious taking**, and sounds in damages like an action of trespass, to which it is extremely analogous.³ Replevin is founded upon an unlawful détention, whether there was an unlawful taking or not.⁴ There are no fictions of law to be indulged in, in the action of replevin. It originates in wrong, and can only be supported while it exists.⁵

§ 23. **Object of the action.** *The primary object* of our action of replevin is to enable the plaintiff to obtain the actual possession of property wrongfully detained from him by the defendant, at the time the action is brought.⁶ The primary object of replevin is to recover the property in *specie*, not its value.⁷

§ 24. **The same.** *The secondary object* is to recover an amount of money which shall be an equivalent of the value of the property sued for, if the prime object is for any reason defeated; and also damages that will compensate for the loss of the use of the property, though usually this is of little importance in the action.⁸ But the recovery of damages has been

¹ McArthur v. Oliver, 60 Mich. 605 (27 N. W. 689).

² Batchelor v. Walburn, 23 Kan. 733.

³ Hopkins v. Hopkins, 10 Johns. (N. Y.) 369.

⁴ Sexton v. McDowd, 38 Mich. 149.

⁵ Adams v. Wood, 51 Mich. 411 (16 N. W. 788).

⁶ Clark v. West, 23 Mich. 242; Hickey v. Hinsdale, 12 Mich. 99.

⁷ Herdic v. Young, 55 Pa. St. 176; Hunt v. Robinson, 11 Cal. 277; Nickerson v. Chatterton, 7 Cal. 568; Buckley v. Buckley, 12 Nev. 426.

⁸ Buckley v. Buckley, 12 Nev. 426; Yates v. Fassett, 5 Denio, 21; Burr v. Daugherty, 21 Ark. 559; Bruen v. Ogden, 6 Holst. (N. J.) 371; Hart v. Fitzgerald, 2 Mass. 509; Ellis, Admr. v. Culver, 2 Harr. (Del.)

held to be, in a proper case, as much a primary object of the action of replevin as is the recovery of the property in specie.¹ In those states which allow it to proceed as an action for damages when the property is not taken, and those in which it may be started as an action of damages, and the property taken at any time during its pendency by making affidavit and filing bond, this is the proper view. Replevin in the latter case is hardly a distinct action, but rather an appendage to another action.

§ 25. **Scope of the investigation.** The investigation in replevin is confined to the property mentioned in the complaint; other property cannot be brought into the controversy by answer.² According to the general nature of replevin, the state of things existing when the suit is commenced will control the determination; and this rule must always prevail unless very peculiar and unusual reasons exist to prevent it.³ In replevin the question is, Who was entitled to the possession of the property when the action was begun?⁴ Right of property and possession thereof only can be tried.⁵ But any facts that form part of the *res gestæ* are admissible as in other actions, and all the incidents which will help to determine the main question—the right to possession—should be examined into.

§ 26. **The same illustrations.** When the action is for the recovery of goods wrongfully attached by an officer on

129; Gray v. Nations, 1 Ark. 559; Whitfield v. Whitfield, 40 Miss. 352; Stevens v. Tuitt, 104 Mass. 332; Parham v. Riley, 4 Coldw. (Tenn.) 5; Smith v. Houston, 25 Ark. 184; Frazier v. Fredericks, 4 Zab. (N. J.) 163; Loomis v. Tyler, 4 Day (Conn.), 141; Broadwater v. Darne, 10 Mo. 278.

¹ Burrage v. Melson, 48 Miss. 244. See Buckley v. Buckley, 12 Nev. 423.

² Lovensohn v. Ward, 45 Cal. 8.

³ Cary v. Hewitt, 26 Mich. 228.

⁴ Kingsbury v. Buchanan, 11 Iowa, 387; Cassell v. Western Stage Co., 12 Iowa, 47; Campbell v. Williams, 39 Iowa, 646; Marshall v. Bunker, 40 Iowa, 121.

⁵ Gillespie v. Brown, 16 Neb. 462 (20 N. W. 632).

process against another, the plaintiff must recover on the strength of his own title, which is liable to be defeated by any state of facts showing that the property was liable to the levy.¹ Where the holder of a prior mortgage replevied from the sheriff, the latter was permitted to set up as a defense under the statute that the mortgage was to secure a loan on usurious interest.² Where the action was for a distress for rent, the defendant was permitted to show that he purchased the premises with the consent of his landlord.³ Where the action was for wheat stored with the defendant, and he justified on the ground that he was a warehouseman, the plaintiff was allowed to show that some forty bushels were lost, and that the value of this exceeded the storage.⁴ Where the defendant claimed that the property belonged to his minor son, and that he, as natural guardian, was bound to keep the custody of it, the plaintiff was allowed to show that he bought of both defendant and his son, and the defendant was allowed to show that the sale was fraudulent.⁵ In replevin to recover property taken on a chattel mortgage, the plaintiff claimed the mortgage was given to secure a note given for machinery purchased under a warranty; that there was a breach of the warranty, and that he had been damaged thereby to the amount of the note, and it was held that the issue thus tendered was triable in replevin.⁶ Replevin is the proper process to obtain possession of property which plaintiff claims as his own.⁷ The action of replevin is a possessory one, and, as a general rule, one in the actual and undisputed possession of property cannot be required, as against a mere intruder, to show title.⁸

¹ Hotchkiss v. Ashley, 44 Vt. 198.

² Dix v. Van Wyck, 2 Hill, N. Y. 522.

³ Hill v. Miller, 5 S. & R. (Pa.) 355.

⁴ Bobb v. Talcott, 47 Mo. 343; Gillham v. Kerone, 45 Mo. 490.

⁵ Bliss v. Badger, 36 Vt. 338.

⁶ Hutt v. Bruckman, 55 Ill. 441; Bruce v. Westervelt, 2 E. D. Smith, 440.

⁷ Mendelsohn v. Smith, 27 Mich. 2.

⁸ Hatch v. Fowler, 28 Mich. 205.

Replevin lies to obtain possession of personal property, and it cannot be turned into a suit to quiet a party's title to property already in his possession.¹

§ 27. **Replevin is strictly a possessory action.** "Such wherein the right of possession only, and not of property, is contested."² Its primary object is to enable the plaintiff to obtain the actual possession of personal property wrongfully detained from him by the defendant, at the time the action is brought.³ Generally speaking, in an action of replevin, the right to the possession of the property, at the time the suit is brought, is the only matter in controversy, and the only question that can be tried and determined therein.⁴ Replevin is a mere possessory action to recover the possession of property of which the plaintiff is deprived by a tort.⁵ The action for the recovery of personal property is undoubtedly a possessory action, wherein a mere possessory right may, and often will, prevail against an absolute legal title, where the absolute title to personal property, and the right to the possession thereof, become separated and are held by different parties.⁶

¹ *Bacon v. Davis*, 30 Mich. 157.

² 2 Black. Com. 198.

³ *Hickey v. Hinsdale*, 12 Mich. 100; *Huron v. Beckwith*, 1 Wis. 20; *Jackson v. Sparks*, 36 Ga. 445; *Childs v. Childs*, 13 Wis. 17; *Smith v. Williamson*, 1 Har. & J. (Md.) 147; *Seldner v. Smith*, 40 Md. 603; *Corbitt v. Heisey*, 15 Iowa, 296; *Johnson v. Carnley*, 6 Seld. (N. Y.) 578; *McCoy v. Cadle*, 4 Clark (Iowa), 557; *Rose v. Cash*, 58 Ind. 278; *Hunt v. Chambers*, 1 Zab. (21 N. J.) 624.

⁴ *Kramer v. Matthews*, 68 Ind. 172; *Pacey v. Powell*, 97 Ind. 371; *McFadden v. Ross*, 108 Ind. 512; *Hall v. Durham*, 113 Ind. 327 (15 N. E. 529).

⁵ *Rose v. Cash*, 58 Ind. 278.

⁶ *Entsminger v. Jackson*, 73 Ind. 144; *Kramer v. Matthews*, 68 Ind. 172.

CHAPTER III.

LANDLORD AND TENANT—DISTRESS.

	Section.		Section.
The landlord cannot sustain replevin for his share until it is set apart	28	Gross abuses	38
The landlord in such a case should bring bill in equity, not replevin	29	Chief use was to collect rent	39
But if landlord's right is denied, he may replevy	30	At first a distress could not be sold	40
Where the tenancy is for a definite time, replevin will not lie until the time is up	31	Later rule under the statute of 2 W. & M., Ch. 5	41
Landlord may replevy his share when ready for delivery	32	The theory out of which distress grew	42
Crops on leased land belong to the tenant until gathered and divided	33	To authorize a distress must be an actual demise	43
Assignee of landlord may replevin when share set apart	34	Distress only lies for rent in arrears	44
Where a tenant abandons his lease	35	It could be taken for any kind of rent	45
A tenant has a right to possession even against the landlord	36	Distress as known at the common law is almost unknown in this country—Attachment takes its place	46
Distress—History	37	Where it could be made	47
		What is triable in a replevin of a distress	48
		Venire how laid in a replevy of a distress	49
		Action by tenant—Tender	50

§ 28. The landlord cannot sustain replevin for his share until it is set apart. Where a tenant agrees to deliver a share of the crop for rent, the landlord cannot sustain replevin for any portion until his share has been ascertained and set apart or separated from the tenant's.¹ Where

¹ Lacy v. Weaver, 49 Ind. 373; Williams v. Smith, 7 Ind. 559; Chisom v. Hawkins, 11 Ind. 316; Fowler v. Hawkins, 17 Ind. 211; Daniels v. Brown, 34 N. H. 454; Dixon v. Niccolls, 39 Ill. 372; Alwood v. Ruckman, 21 Ill. 200; Sargent v. Courier, 66 Ill. 245.

a landlord agreed to receive a part of the crop as rent, to be harvested by the tenant, and delivered to him in the crib, and it was levied on as the property of the tenant while yet in the field, *Held*, That the landlord could not maintain replevin for his share prior to a division.¹

§ 29. **The landlord in such a case should bring bill in equity not replevin.** Where a party first purchased land, but, being unable to pay for it, agreed to deliver a part of the crop as rent for the use of the land, and afterwards refused to do so, and was in the act of selling and converting the crop, it was held that the landlord could not maintain replevin for a part of the corn, but that his only remedy was by bill in equity.²

§ 30. **But if landlord's right is denied, he may bring replevin.** A landlord who has an interest in the crop may bring claim and delivery against the tenant or a stranger who denies his right of possession under his lien, as well as where the entire crop has been removed from the land.³

§ 31. **Where the tenancy is for a definite time, replevin will not lie until the time is up.** Replevin will not lie for property held in connection with a tenancy on shares running from year to year, and terminable only by notice, so long as the year has not expired and notice has not been given.⁴ Parties may stipulate as to what share each is to have in a crop to be raised, and what time it is to be delivered and separated, and it will be valid between themselves, and replevin will not lie until the time fixed for delivery.⁵

§ 32. **Landlord may replevy his share when ready for delivery.** One who has leased a farm upon the tenant's agreement to deliver in payment half the produce is a tenant in common in respect to such produce, and when the

¹ *Sargent v. Courier*, 66 Ill. 245. See *Lacy v. Weaver*, 49 Ind. 376; *Williams v. Smith*, 7 Ind. 559; *Lindley v. Kelley*, 42 Ind. 294.

² *Parker v. Garrison*, 61 Ill. 251.

³ *Livingston v. Farish*, 89 N. C. 140.

⁴ *Coon v. Male*, 39 Mich. 454.

⁵ *Lanyon v. Woodward*, 55 Wis. 652 (13 N. W. 863).

grain is threshed and ready for delivery may demand his share; and if refused, maintain replevin therefor.¹ Where the grain was harvested and ready for delivery, and the tenant took his part and left the landlord's in the bin, and went away, this was *held* a sufficient division, so that the landlord could maintain replevin.²

§ 33. **Crops on leased land belong to the tenant until gathered and divided.** Where a landlord leases land upon shares, his share to be delivered in crib, he has not such an interest in the crop that he can maintain replevin for his share while it is standing in the field. The crop, until gathered and divided, belongs to the tenant, and his interest is subject to levy for his debts.³

§ 34. **Assignee of landlord may replevy when share set apart.** While a landlord has no property in the crop of his tenant until matured and his proportion set apart still he may assign his interest, and when set apart his assignee may maintain replevin.⁴

§ 35. **Where a tenant abandons his lease,** and the whole crop is levied on for the tenant's debt, the landlord may replevy his interest in a growing crop.⁵ While the landlord has no right as against the tenant until the crop is divided, as against a stranger he has a right to his share even before the division is made. So far as the landlord's interest is concerned, the officer is regarded as a trespasser.

§ 36. **A tenant has a right to possession, even against the landlord.** Where, by the terms of a lease, the tenant

¹ Sutherland v. Carter, 52 Mich. 471 (18 N. W. 223); Crouse v. Derbyshire, 10 Mich. 479; Fiquet v. Allison, 12 Mich. 328; Kindy v. Green, 32 Mich. 310; Kaufmann v. Schilling, 58 Mo. 219; Inglebright v. Hammond, 19 Ohio, 337; Ryder v. Hathaway, 21 Pick. 305; Warner v. Cushman, 31 Ill. 283; Taylor's Landl. & T. (6th Ed.) 19; Caswell v. Districh, 15 Wend. 379.

² Burns v. Cooper, 31 Pa. St. 429.

³ Sargent v. Courier, 66 Ill. 245. See Alwood v. Ruckman, 21 Ill. 200; Dixon v. Niccolls, 39 Ill. 372, as to title to crops.

⁴ Lufkin v. Preston, 52 Iowa, 235 (3 N. W. 58).

⁵ Atkins v. Womeldorf, 53 Iowa, 150 (4 N. W. 905).

is to thresh the wheat crop and deliver to the landlord a certain share in the bushel, the tenant has a right to possess the wheat for the purpose of performing his contract, and may maintain replevin therefor, even against the landlord.¹ A tenant may recover personalty violently or fraudulently taken from his lawful possession by his landlord, though the title may be in the latter.²

§ 37. **Distress—History.** Distress is defined as the taking of a personal chattel out of the possession of an alleged wrongdoer, by the person claiming to be injured, into his own custody to compel satisfaction for the wrong complained of.³ The thing taken, as well as the process by which it was taken, was called a distress. History does not inform us just how this custom originated, but doubtless in the early history of civilization, when "might made right" and superior force was the only law respected. It seems to have been used in most any case where the one having the superior force desired to coerce a person of inferior physical force into doing an act or paying a debt claimed of him, and is spoken of in three divisions: "1st. When the taking is justifiable, and the detaining also, as for a debt due, recovered. 2d. Where both are wrongful, such as are disavowable both in taking and detaining. 3d. Where the taking is lawful, as in damage feasant, and the taking tortious as against sufficient gages and pledges tendered."⁴ In 1267 distresses are spoken of as revenges.⁵ The distresses were usually the cattle of the debtor, probably from the ease with which it could be taken, and the

¹ *Cunningham v. Baker*, 84 Ind. 597; *Williams v. Smith*, 7 Ind. 559; *Chissom v. Hawkins*, 11 Ind. 316; *Lacy v. Weaver*, 49 Ind. 373 (19 Am. R. 683).

² *Ivey v. Hammock*, 68 Ga. 428, under the Georgia Code, § 4035. The issue is not the right of possession or of property, but in whose lawfully acquired, quiet and peaceable possession it last was. See *Trotti v. Myly*, 77 Ga. 684.

³ 3 Blackstone, 6; Gilbert on Distresses, 4; Bradby on Distresses, p. 1.

⁴ *Mirror of Justices*, Ch. 2, § 26.

⁵ Stat. Marlbridge, 52 H. III., Chap. 1 and 3.

actual distress brought upon the debtor by taking from him this, the most important of his possessions. But we must remember that the term cattle was used with a more general meaning then than now, being a general term including horses and chattels.¹

§ 38. **Gross abuses** grew out of the exercise of such a right for such a general purpose. It was used by the barons in feudal times as a powerful force to coerce the tenants into performing military service, that they might appear at the head of a large body of vassals. When neighboring lords were seeking to enlarge their domains, tenants were frequently distrained upon by both. The husbandry of the realm—then its only support—was greatly injured and the public peace disturbed. In the latter part of Henry III. it had become a crying evil and seriously threatened the peace of the realm, and laws were enacted regulating distress and forming remedies for illegal distresses. Out of this early legislation our replevin grew, which title see.²

§ 39. **Chief use was to collect rent.** The right of distress was most frequently used to enforce the payment of rent or dues by a tenant to his lord the owner of the land. If the tenant failed in the payment of his rent, or refused to perform the service which his feudal contract bound him to do, the lord would seize his goods, and detain them as a pledge or security to compel payment or performance.³

§ 40. **At first it could not be sold,** but must be held as a pledge, but if placed in pound overt they could be kept until the claim was paid to the distrainor, and they were so held at the risk and cost and expense of the debtor, and must be fed and cared for by him. It was thus in the power of the landlord to harass and distress the debtor for

¹ 3 Blackstone, 6; Macauley's History, Vol. I., p. 294.

² 3 Blackstone, 14; Gilbert on Distresses, 3, Statute de Distractione Scaccarii, 51 Henry III. 1266, Statute Marl. 52, Henry III., C. 1. Reeves History, Vol. 2, p. 66.

³ 3 Blackstone, 145; Evans v. Brander, 2 H. Bla. 547.

an indefinite period unless he should perform the service or pay the sum demanded.¹

§ 41. Later, under the statute of 2 W. and M., Ch. 5, it was provided that unless the owner of the goods distrained should within a certain time replevy them, the distrainor should appraise and sell them after due notice. But this act was construed to not be imperative but at the option of the landlord to sell or hold as a pledge,² but in Pennsylvania, in 1772, a similar statute was passed and afterward construed differently by the courts.³ So that at common law the distress was only a pledge to compel the payment of certain dues, or the performance of certain services. The distrainor had no right to sell it to satisfy his claim. And after an action of replevin, the effect of the judgment of *retorno habendo* was merely to put him in the condition in which he was before the action was begun. That is to say, the beasts or chattels were returned to him merely as a pledge to be retained until the rent or duty for which they were taken was paid or satisfied. And it was often the case that, pending the first writ of replevin, the distrainor would distrain a second time for the same rent or service, but since he had already security to have return upon making out the justice of his first caption, it was highly reasonable that, pending that suit, the tenant should be protected from further distresses, for the same rent or cause for which the first distress was taken. For this purpose the writ of recaption was framed, in which, if the defendant was convicted, he was fined to the king; because, by the second caption, he took upon him to determine the justice and legality of the first while that very point was under the consideration of the court of justice in which the replevin depended, for if the first distress were lawful, he

¹ 3 Blackstone, 14-145; Gilbert on Distress, 4; *Woglam v. Cowperthwaite*, 2 Dall. 68.

² *Hudd v. Ravenor*, 2 B. & B. 662; *Lear v. Edmonds*, 1 B. & Ald. 157; *Lingham v. Warren*, 2 B. & B. 36.

³ *Quin v. Wallace*, 6 Whart. 452.

should have return of it; and, therefore, the second was unreasonable. If the first were unlawful, much more so was the second taking for the same cause; so that the recaption lay even where the cause of the first caption was just.

§ 42. **The theory out of which distress grew** was that no man needed the aid of the law to take what was his own. The power of distress was given to the lord in lieu of a forfeiture of the land. The common people who occupied the lands were bondsmen, and deemed incapable of owning land. As these bondsmen became enfranchised, in course of time, they were conceded a right to the use of the soil, but not to acquire the title, and the rents remained the property of the landlord, and he continued to collect them by his own authority.¹

§ 43. **To authorize a distress** there must be an actual demise—an agreement for one will not do—at a certain fixed rent, payable either in money, in produce, or by services. But a parol demise is sufficient, if the terms are capable of being made definite by evidence.² If the rent is to be paid in repairs, and the amount of the repairs is not definitely settled, the landlord cannot distrain. But if to be paid in kind—that is, a certain quantity of the grain raised—the landlord could distrain for so many bushels in arrear, fixing a value in order that if the goods should not be replevied, or the arrears tendered, the officer may know what amount of money is to be raised by the sale; and in such case the tenant may tender the arrears in grain.³ In Louisiana the landlord may follow goods removed from his premises for fifteen days after removal, provided they continue to be the property of the tenant.⁴ As a means of collecting rent, however, it has become very unpopular in the United

¹ Taylor on Landlord and Tenant, § 557.

² Coke Litt. 96 a; Reeves' History of Eng. Law, Vol. II., 475; Miles v. Stevens, 3 Pa. St. 31; Jacks v. Smith, 1 Bay. (S. C.) 315.

³ Warren v. Forney, 13 Serg. & R. (Pa.) 52; Jones v. Gundrin, 3 Watts & S. (Pa.) 531.

⁴ La. Civil Code, 2675.

States as giving an undue advantage to landlords over other creditors in the collection of debts.¹

§ 44. **Distress would only lie for rent in arrear, and therefore could not be brought until the day after it was due unless made payable in advance or on a day certain.** But no previous demand was necessary in the absence of a stipulation to that effect. An unsatisfied judgment for the rent in arrear did not extinguish the right to distrain. Nor the taking of a note or security unless it was taken in absolute payment.² Each one of several joint tenants was allowed to distrain for all the rent and account to the others, or they could all join. But if the rent was of an entire thing, as of a house, they must all join, as the subject matter was held incapable of division.³

§ 45. **It could be taken for any kind of rent in arrear, the detention of which beyond the day of payment was injurious to him who was entitled to receive it.** At common law the distrainor must have possessed a reversionary interest in the premises out of which the distress issued, unless he had expressly reserved a power to distrain when he parted with the reversion.⁴ But the English Statute of 4 Geo. II., C. 28, abolished these distinctions, and gave the remedy in all cases where rent was reserved upon a lease. The effect of the statute was to separate the right of distress from the reversion to which it had before been incident, and to place every species of rent upon the same footing as if the power of distress had been expressly reserved in each case.

§ 46. **Distress as known at the common law is almost unknown in this country.** Where recognized in this country it is so modified by statute as to make the old decisions

¹ Taylor on Land. & T. § 556; *Woglam v. Cowperthwaite*, 2 Dall. (Penn.) 68; *Ridge v. Wilson*, 1 Blackf. (Ind.) 409; *Owens v. Conner*, 1 Bibb (Ky.), 607; *Mayo v. Winfree*, 2 Leigh (Va.), 370; *Burket v. Boude*, 3 Dana, (Ky.) 209.

² *Bates v. Nellis*, 5 Hill, N. Y. 651.

³ 5 Term, 248; *Coke Litt.* 197 a, 317; *Croke Jac.* 611.

⁴ *Cornell v. Lamb*, 2 Cow. (N. Y.) 652; 1 Term, 441; *Coke Litt.* 143 b.

thereon of little value.¹ In many of the states it never had a foothold in any form.² In others it has been abolished by statute.³ The law of attachment on *mesne* process has superseded the law of distress. The state of New York has expressly abolished it by statute. In North Carolina it is held to be inconsistent with the spirit of her laws and government, and the courts have declared that the common process of distress does not exist in that state. In Georgia it is limited to the cities of Savannah and Augusta, while in Ohio, Alabama, and Tennessee there are no statutory provisions on the subject, except in the former state to secure to the landlord a share in the crops in preference to an execution creditor.⁴ Mississippi has abolished it by statute; but property can not be taken in execution on the premises unless a year's rent, if it be due, is first tendered to the landlord.

§ 47. **Where it could be made.** A distress could be made either on or off the land. As a general thing, it was confined to things on the land out of which it issued.⁵ And where land was rented to several, the lord could distrain for the whole upon the land of any of them, because the whole rent was deemed to issue out of every part of the land.⁶ If there was a house on the land, the distress could be made in the house; if the outer door or window was open, a distress could be taken out of it. If an outer door was open,

¹ Powers v. Florence, 7 La. Ann. 524; Howard v. Dill, 7 Ga. 52; Mitchell v. Franklin, 3 J. J. Marsh. 477; Woglam v. Cowperthwaite, 2 Dall. (Pa.) 68; Ridge v. Wilson, 1 Blackf. 409; Burket v. Boude, 3 Dana, 209; Penny v. Little, 3 Scam. (Ill.) 301; Gray v. Rawson, 11 Ill. 527; Owen v. Boyle, 22 Me. 47; Trieber v. Knabe, 12 Md. 149; Coburn v. Harvey, 18 Wis. 147; Riddle v. Weldon, 5 Whart. 9; Briggs v. Large, 30 Pa. St. 287; Allen v. Agnew, 4 Zab. (N. J.) 443; Hall v. Amos, 5 T. B. Mon. (Ky.) 89.

² Dalglish v. Grandy, Cam. & N. (N. C.) 22.

³ Guild v. Rogers, 8 Barb. 502; Crocker v. Mann, 3 Mo. 472.

⁴ Griffith Law. Reg. 404; Aiken Dig. 357.

⁵ 2 Strong, 1040; Rep. temp. Hardw. 245; 1 Ld. Raym, 55; 12 mod. 76.

⁶ Rolle Abdr. 671.

an inner door could be broken for the purpose of taking a distress, but not otherwise.¹ But if property was clandestinely removed from the premises to avoid distress, it could be distrained wherever found within thirty days.² As before remarked, distress has been so modified by statute where it exists at all as to make the old decisions of little value, and for that reason but few of them have been cited. A few citations of a later date on the general principles follow. For a more extended discussion of this matter, the reader is referred to works on that special subject.

§ 48. **What is triable in a replevin of a distress.** The action of replevin may be brought to try the legality of distress for rent, provided there is no sum whatever due, but if any sum, however small, is due, and the distress is for a greater sum, or is excessive in regard to the quantity of goods taken, or otherwise irregular, the remedy must be *in case*.³ In such an action the tenant may show breaches of the covenants on the part of the landlord which have produced damages equal to or greater than the amount of the rent due, and thus defeat the levy of the distress warrant. But where other stock followed off the distrained stock the landlord's liability incurred on this account cannot be settled in the replevin of the distress.⁴

§ 49. **Venue how laid in replevy of a distress.** The declaration for replevin of distrained animals is sufficient if it state the town where the distraint occurred,⁵ though the old decisions required a more particular statement of place.⁶

¹ Comb, 47; Cas. temp Hard, 168; 6 Bingh. 150.

² 3 Esp. Nisi Prius, 15; 7 Bingh. 423; 1 Mood & M. 535; 4 Campb. 135. See Hammond N. P. 382; 5 Dom. Abr. 34; Coke Litt. 47 a; Bacon Abr. Distress B.; 4 Term, 565.

³ Hare v. Stegall, 60 Ill. 380; Chitty's Pleadings, Vol. 1, p. 188 (6th Am. Ed.)

⁴ Lindley v. Miller, 67 Ill. 244. See Streeter v. Streeter, 43 Ill. 155.

⁵ Strong v. Lawler, 37 Conn. 177.

⁶ Patten v. Bradley, 2 Moore & Payne, 78; Potter v. North, 1 Saund. 347; Banks v. Angell, 7 Adolp. & Ell. 841; 6 Bac. Ab. Replevin & Avowry, H. 72; 1 Chitty on Plead. 161; Stephen on Plead. 202; Browne.

§ 50. **Action by tenant.** An action will lie against a landlord by a tenant who has tendered the rent in arrear after the distress levied, but before the goods are removed or impounded.¹ Chattels seized and distrained and sold for rent due can not be replevied by virtue of title founded on an appraisement under the poor debtors' act.²

on Actions at Law, 447; 2 Greenl. Ev. § 562; *Gardner v. Humphrey*, 10 Johns. 53; *Trulock v. Rigsby*, Yebo, 185.

¹ *Hilson v. Blain*, 2 Bailey (S. C.), 168.

² *Bonsall v. Comly*, 44 Pa. St. 442. See *Taylor's Landlord & Tenant*, § 748-750; *Woodfall's Landlord & Tenant*, 514.

CHAPTER IV.

WHEN THE ACTION LIES GENERALLY.

	Section.		Section.
When the action lies generally	51	Defendant must be in possession	61
The action lies generally when there has been an illegal taking	52	What constitutes possession by an officer	62
When it lies generally old and modern rule	53	Levy without possession is no ground for replevin	63
The same illustrations,	54	Replevin will not lie against one who is not detaining	64
The same negative illustrations	55	Mere acts of ownership insufficient	65
It does not lie for the purpose of determining the title to real estate	56	Exception—Where property in defendant's possession is wrongfully transferred different rule by statute	66
But will by a receiptor of goods	57	Where only part of the property is taken	67
As regards possession	58	Cases depending on particular facts	68
Replevin lies for property in the hands of a receiptor	59		
When right to possession alone sufficient when plaintiff must have legal title	60		

§ 51. **When the action lies generally.** At common law the action only lies where the property was unlawfully taken, and was termed replevin *in the cepit*; but under statutes, perhaps generally, the remedy by the action of replevin is enlarged so as to embrace property wrongfully detained, and is called replevin *in the detinet*. Replevin *in the detinet* was a creation of statute.¹ Under the statutes, if the action is *in the detinet*, it will generally lie whenever trover could be maintained at common law; that is, whenever the defendant wrongfully detains chattels, or converts the same, with-

¹ Dame v. Dame, 43 N. H. 37; Ely v. Ehle, 3 Comst. N. Y. 506; Vaiden v. Bell, 3 Rand. (Va.) 448; Rector v. Chievalier, 1 Mo. 345; Trapnall v. Hattier, 1 Eng. (Ark.) 18; Dearmon v. Blackburn, 1 Sneed. (Tenn.) 390 (60 Am. Dec. 160).

out regard to the manner in which they were obtained by the defendant,¹ the action will lie. Generally, the action lies at common law, whenever the plaintiff could maintain trespass for the unlawful taking.² Generally, it may be said that the action will not lie against one who has come into the lawful possession of chattels, if he has any legal or equitable lien on the same, or where he has not actual or constructive possession of the same.³ And if personal property has been leased by the owner, he cannot usually maintain the action against the lessee during the terms of the lease; but the lessee may maintain it as against the lessor or other person who takes it out of his possession wrongfully.⁴

§ 52 **The action generally lies when there has been an illegal taking.** In England and most of the states, the action now generally lies when there has been an illegal seizure or taking of chattels. Thus it generally lies to recover the possession of property, seized on execution or other process, which is the property of the plaintiff and not of the defendant in execution.⁵ Replevin, at common law, is a form of action which lies to regain possession of personal chattels which have been wrongfully taken from the plaintiff. Under statutes, the plaintiff may, in various states, bring this action whenever he wishes to recover specific chattels to which he claims title and the right of possession, and which

¹ *Sawtell v. Rollins*, 23 Me. 196; *Evelette v. Blossom*, 54 Me. 447; *Willis v. Barrister*, 36 Vt. 220; *Marshall v. Davis*, 1 Wend. 109; *Crocker v. Mann*, 3 Mo. 472; *Estee's Pleadings*, 2164-5, 4180.

² *Sawtell v. Rollins*, 23 Me. 196; *Pangburn v. Patridge*, 7 Johns. (N. Y.) 140; *Rogers v. Arnold*, 12 Wend. (N. Y.) 30; *Allen v. Crary*, 10 Wend. 109; *Roberts v. Randall*, 3 Sandf. (N. Y.) 707; *Stewart v. Willis*, 6 Barb. 79.

³ *Ramsdell v. Buswell*, 54 Me. 546; *Byron v. Crippen*, 4 Gray (Mass.), 312; *Potter v. Mardre*, 74 N. C. 36; *Newhall v. Dunlap*, 14 Me. 180 (31 Am. Dec. 45); *Hoover v. Hayes*, 10 B. Mon. (Ky.) 72 (Am. Dec. 540).

⁴ *Hunt v. Strew*, 33 Mich. 85; *Simpson v. Wrenn*, 50 Ill. 222; *Moore v. Moore*, 4 Mo. 421.

⁵ *Waid v. Gailord*, 1 Hun. (N. Y.) 607; *Cole v. Mann*, 62 N. Y. 1; *Welsh v. Cochran*, 63 N. Y. 181; *Going v. Orus*, 8 Kan. 85; *Railroad Co. v. Roach*, 21 Alb. L. J. 258; *Stockwell v. Veitch*, 15 Abb. Fr. 412.

are wrongfully detained by another. The plaintiff is usually required to give a bond, with approved sureties, to return the chattels, if a return be awarded, and pay all costs and damages incurred by the defendant by reason of the wrongful suing out of the writ. If the plaintiff establishes his right to the property on the trial, he may now generally not only have judgment for the same, but recover the value of the use of the property during the unlawful detention by the defendant, and for any loss sustained by the depreciation of the property while it was wrongfully detained by the defendant.¹ Under statutes it is now frequently if not generally provided, that an action for the recovery of a chattel cannot be maintained in either of the following cases: 1st. Where the chattel was taken by virtue of a warrant against the plaintiff, for the collection of a tax, assessment, or fine, issued in pursuance of a statute of the state or of the United States, unless the taking was, or the detention is, unlawful. 2d. Where it was seized by virtue of an execution, or warrant of attachment, against the property of the plaintiff, unless it was legally exempt from such seizure, or is unlawfully detained. 3d. Where it was seized by virtue of an execution, or a warrant of attachment against the property of a person other than the plaintiff, and at the time of the seizure the plaintiff had not the right to reduce it into his possession.²

§ 53 **When it lies generally—Old and modern rule.** Originally, replevin would only lie for a distress for rent, and later, at common law, replevin would only lie where there had been a tortious taking.³ In Connecticut the writ is sustainable only in cases of attachment and distress, and there

¹ *Rowley v. Gibbs*, 14 Johns. (N. Y.) 385; *Frazier v. Fredericks*, 24 N. J. L. 162; *Gordon v. Jenny*, 16 Mass. 465; *Field's Briefs*.

² *Field's Briefs*, § 196; *Musgrove v. Hall*, 40 Me. 489; *Morely v. Anderson*, 40 Miss. 49; *Niagara Elevating Co. v. McNamara*, 50 N. Y. 653; *Railroad Co. v. Kane*, 72 N. Y. 614; *Hudler v. Golden*, 36 N. Y. 446.

³ *Tropnall v. Hattier*, 1 Eng. (6 Ark.) 18; *Wright v. Armstrong*, 1 Ill. (Breeze) 130; *Rector v. Chevalier*, 1 Mo. 345; *Dame v. Dame*, 43 N. H. 37; *Ely v. Ehle*, 3 Comst. (N. Y.) 506; *Vaiden v. Bell*, 3 Rand. (Va.) 448.

the plaintiff must show not only a taking and detention, but an attachment or distress.¹ But this old rule has been changed and the scope of the writ greatly enlarged in most of the states, until it may be used wherever one claims property in another's possession.² Replevin lies when one claims goods in the possession of another, without regard to the manner in which they were obtained.³ Replevin lies in Pennsylvania for the property of one person in the possession of another, whether the claimant ever had possession or not, and whether his property be absolute or qualified, provided he has the right of possession.⁴

§ 54. **The same—Illustrations.** Replevin will lie where trespass would lie.⁵ Where trespass or trover can be maintained for the unlawful conversion of goods, replevin will also lie.⁶ It will lie by a stranger whose property has been taken under process;⁷ by an officer from whose custody property is taken;⁸ for any wrongful taking of property.⁹ Possession or right to possession at the time of the caption is necessary to maintain the action;¹⁰ where property has been improperly seized by an officer;¹¹ when plaintiff has a

¹ *Watson v. Watson*, 9 Conn. 140.

² *Doggett v. Robbins*, 2 Blackf. (Ind.) 415; *Cullum v. Bevans*, 6 Har. & J. (Md.) 469; *Bruen v. Ogden*, 11 N. J. L. (6 Hals.) 370; *Pangburn v. Patridge*, 7 Johns. (N. Y.) 140; *Weaver v. Lawrence*, 1 Dall. 156; *Harlan v. Harlan*, 15 Pa. St. 507; *Herdie v. Young*, 55 Pa. St. 176; *Stone v. Wilson, Wright* (Ohio), 159.

³ *Craig v. Kline*, 65 Pa. 399.

⁴ *Harlan v. Harlan*, 15 Pa. St. 507; *Miller v. Warden*, 111 Pa. 300.

⁵ *Phillips v. Harriss*, 3 J. J. M. 126; *Rowell v. Klein*, 44 Ind. 290.

⁶ *Marshall v. Davis*, 1 Wend. (N. Y.) 109; *Crocker v. Mann*, 3 Mo. 472; *Sawtelle v. Rollins*, 23 Me. 196.

⁷ *Phillips v. Harriss*, 3 J. J. M. 125.

⁸ *Bourne v. Hocker*, 11 B. M. 29; *Dezell v. Odell*, 3 Hill (N. Y.), 215.

⁹ *Bouldin v. Alexander*, 7 Mon. 425.

¹⁰ *Dillon v. Wright*, 4 J. J. M. 255; *Id.* 7 *Id.* 10; *McIsaacs v. Hobbs*, 8 Dana, 269.

¹¹ *Gimble v. Ackley*, 12 Iowa, 27.

lien on property taken from him against his will.¹ When personal property is unlawfully sold, the owner may at his election seek redress by replevin or trover.² It lies for goods wrongfully taken without a previous demand.³ Any unlawful interference with the property of another, or exercise of dominion over it, by which the owner is damnified, is sufficient to maintain the action.⁴ The owner and shipper may bring replevin for a cargo, where the master wrongfully refuses to proceed on the voyage.⁵ It will lie for a school-house.⁶

§ 55. **The same—Negative illustrations.** It will not lie when the defendant has a special property in the chattels determinable on certain conditions until the conditions are complied with fully;⁷ nor to try the right of property;⁸ nor where the owner of a stray raft regained possession of it by force, the taker cannot maintain replevin.⁹ It will not lie by a defendant in execution,¹⁰ nor for the recovery of property seized to satisfy a sheriff's fee bill.¹¹ Replevin does not lie unless there has been an unlawful taking from the possession of another.¹²

§ 56. **It does not lie for the purpose of determining the title to real estate.** But the owner may bring replevin for chattels severed from the freehold where there is no adverse possession, or where the adverse possessor is a tres-

¹ *Young v. Kimball*, 23 Pa. St. 193.

² *Eggleston v. Mundy*, 4 Mich. 295.

³ *Pierce v. Van Dyke*, 6 Hill (N. Y.), 613.

⁴ *Stewart v. Wells*, 6 Barb. (N. Y.) 79; *Haythorn v. Rushforth*, 19 N. J. L. 160; *Neff v. Thompson*, 8 Barb. (N. Y.) 213.

⁵ *Portland Bank v. Stubbs*, 6 Mass. 422.

⁶ *Joint School Dist. v. Kemen*, 65 Wis. 282 (27 N. W. 31).

⁷ *Stapleford v. White*, 1 Houst. (Del.) 238.

⁸ *Taggart v. Hart, Brayt.* (Vt.) 115.

⁹ *Coverlee v. Warner*, 19 Ohio, 29.

¹⁰ *Reynolds v. Salle*, 2 B. Mon. 18; *Saffell v. Wash*, 4 B. Mon. 92.

¹¹ *Morgan v. Craig*, Hard. (Ky.) 101.

¹² *Meany v. Head*, 1 Mass. 319.

passer.¹ It will not lie for the recovery of real property,² nor to collect damages for conversion.³

§ 57. **But will by a receiptor of goods,** where he is bound to deliver them by a certain day or pay the execution under which they were taken, though he left them in possession of the execution defendant.⁴ But where T. held out property as his own and thereby obtained credit from S., and S. levied on the property for the debt thus made, T. cannot maintain replevin for the property as the property of L., whose agent he now claims to be.⁵ And an agreement on the part of a debtor to deliver as security to his creditor certain personal property, will not enable the latter to maintain detinue therefor in case of its non-delivery.⁶

§ 58. **As regards possession.** In general, replevin will lie against any person (except officers of the law, having possession legally, by virtue of legal process) in whose possession personal property, unlawfully taken, is found; nor need unlawful taking by the defendant be proved.⁷ But the property must be actually out of the possession of the plaintiff in replevin.⁸ If, after an action commenced, plaintiff obtain possession of the property by picking it up where he chanced to find it, it will not extinguish his right of action.⁹ The authorities are numerous and decisive that the right to possession of personal chattels by the plaintiff and an actual wrongful taking by the defendant are sufficient to support

¹ *Baker v. Campbell*, 32 Mo. App. 529; *Lehman v. Kellerman*, 65 Pa. 489; *Stockwell v. Phelps*, 34 N. Y. 363; *Riewe v. McCormick*, 11 Neb. 261 (9 N. W. 88).

² *Smith v. Stanford*, 62 Ind. 392; *Ricketts v. Darrell*, 55 Ind. 470; *Stockwell v. Phelps*, 34 N. Y. 363.

³ *Seymour v. Vancuren*, 17 How. Pr. (N. Y.) 94.

⁴ *Miller v. Adsit*, 16 Wend. (N. Y.) 335; *Williams v. Morgan*, 50 Wis. 548 (7 N. W. 541).

⁵ *Towne v. Sparks*, 23 Neb. 142 (36 N. W. 375).

⁶ *Berry v. Berry*, 31 Iowa, 415.

⁷ *Murphy v. Tendall*, Humpst. 10.

⁸ *Cummings v. McGill*, 2 Murphy (N. C.), 357.

⁹ *Tracy v. New York, etc.*, 9 Bosw. (N. Y.) 396.

replevin, and that it is a concurrent remedy with trespass *de bonis asportatis*.¹

§ 59. **Replevin lies for property in the hands of a receiptor.** The receiptor's possession is that of the officer. Seizure from him is seizure from the sheriff. A sheriff who attempts to sell goods after a writ of replevin is served on him for them, is a wrongdoer.²

§ 60. **When right to possession alone sufficient, and when plaintiff must have legal title.** Where the plaintiff in an action of detinue has never had the actual possession, he must have the legal title in order to entitle him to recover. A parol agreement by a debtor, that certain personal property belonging to him "should stand good for his indebtedness," not accompanied by a delivery or change of possession, does not convey the legal title, but creates an equitable lien merely, which will not support an action of detinue, as it amounts to no more than a verbal chattel mortgage. But the assignee of a written chattel mortgage has the legal title and may maintain detinue for its recovery in his own name.³ But this general rule is modified where the defendant is a mere wrongdoer. The *naked possession* of goods with claim of right is sufficient evidence of title against one who shows no better title.⁴ The right to bring replevin is doubtful where a legal title to specific property cannot be shown.⁵ A recovery cannot be had in an action to recover possession of personal property of which the

¹ Pangborn v. Partridge, 7 Johns. 140; Marshall v. Davis, 1 Wend. 109; Rogers v. Arnold, 12 Wend. 30; Wheeler v. McFarlain, 10 Wend. 318.

² Mayhue v. Snell, 37 Mich. 305; Dillenback v. Jerome, 7 Cowen (N. Y.), 294; Norton v. The People, 8 Cow. 137.

³ Jackson v. Rutherford, 73 Ala. 155; Russell v. Walker, 73 Ala. 315; Parsons v. Boyd, 20 Ala. 112; Reese v. Harris, 27 Ala. 301; Graham v. Newman, 21 Ala. 497.

⁴ Huddleston v. Huey, 73 Ala. 215; Gafford v. Stearns, 51 Ala. 434; Miller v. Jones, 26 Ala. 260; Folmar v. Copeland, 57 Ala. 588; 2 Greenl. Ev., § 637.

⁵ Parker v. Garrison, 61 Ill. 250.

defendant never had the possession, nor can a recovery be had where the legal title of the property is in defendant, he holding it as trustee for plaintiff. The proper remedy in the latter case is an action in equity for an accounting.¹ Ordinarily, the right to the immediate possession and an illegal detention by the defendant are necessary to sustain the action of replevin. Any other rule would have to be made by an express statute on the subject.² Replevin may be maintained, not only for the unlawful taking, but for the unlawful detention of property.³ Replevin lies for the unlawful detention of goods lawfully taken.⁴

§ 61. **Defendant must be in possession.** To enable plaintiff to maintain an action for the recovery of specific personal property, the defendant must be in possession thereof at the commencement of the action. Where the petition alleges that the defendant is in possession, and the proof shows the contrary, there is such a variance between the allegations and the proof as disables plaintiff from recovering.⁵

¹ *Wheeler v. Allen*, 51 N. Y. 37. Here plaintiff placed in the hands of the defendant a sum of money, at two different times, to invest in the scrip of an insurance company; defendant made the first investment, but caused the scrip to be issued in his name. The last sum he appropriated to his own use, giving to plaintiff a false certificate, stating that it was invested as directed. In an action to recover possession of the scrip, *Held*, that it was impossible to adjudge the delivery of any particular scrip, and that plaintiff could not recover.

² *Spencer v. Roberts*, 42 Conn. 75; *Sander v. Goldsmith*, 41 Conn. 578.

³ *Lamotte v. Wisner*, 51 Md. 543; *Waterman v. Matteson*, 4 R. I. 539.

⁴ *Lathrop v. Bowen*, 121 Mass. 107; *Esson v. Tarbell*, 9 Cush. 407.

⁵ *Haeger v. Marcus*, 5 Mo. App. 565; *Crawford v. Wright*, 5 Mo. App. 577; *Feder v. Abrahams*, 28 Mo. App. 454; *Davis v. Randolph*, 3 Mo. App. 454; *Johnson v. Garlick*, 25 Wis. 705; *Coffin v. Gephart*, 18 Iowa, 257; *Houghton v. Newberry*, 69 N. C. 456; *Hall v. White*, 106 Mass. 599; *Mitchell v. Roberts*, 50 N. H. 486; *Roberts v. Randel*, 3 Sandf. (N. Y.) 707; *Brockway v. Burnap*, 12 Barb. 347. These two New York cases, though well considered, have been overruled in *Ellis v. Lersner*, 48 Barb. 546; but I do not think this case establishes a contrary rule in New York, but rather leaves the question open.

§ 62. **What constitutes possession by an officer.** Replevin will not lie for property which, when levied upon, was left and has remained in plaintiff's possession, even though he became receptor for it to defendant.¹ But a contrary rule was followed where goods were attached and plaintiff in replevin kept the goods, giving the officer a receipt for them. *Held*, that plaintiff was not precluded by his receipt from maintaining replevin, that the officer had made a valid seizure and levy.² And this is the better rule on principle. If the officer's possession, be it actual or constructive, is such that when interfered with he could recapture by replevin, then replevin will lie against him, but where an officer has not possessed himself of chattels under a writ in such a manner that he could maintain trespass or replevin against a wrongful taker, replevin will not lie against him by the real owner, who is a stranger to the writ.³ It is not always necessary that goods levied upon by attachment should be removed, in order to constitute such possession as will be deemed a conversion sufficient to entitle a party to the writ of replevin. But the question of *possession* and the *extent* and *validity* of his lien are matters for the jury.⁴ Where a sheriff has possession and control of property by his deputy, replevin can be main-

¹ *Morrison v. Lumbard*, 48 Mich. 548 (12 N. W. 696). In this case the constable levied on sheep claimed by plaintiff on an execution against plaintiff's father, but did not take possession. In about a week he came back for the sheep, and, on plaintiff objecting to letting them go, told him if he would give him a receipt that they should not leave the farm, he would let them alone. This was done, and plaintiff brought replevin just before the sale advertised by the constable. *Johnson v. Prussing*, 4 Bradw. (Ill.) 575.

² *Williams v. Morgan*, 50 Wis. 548 (7 N. W. 541).

³ *Libby v. Murray*, 51 Wis. 371 (8 N. W. 238). In this case the officer said he levied on the property, but did not serve the writ or take possession of the property. See also *Gallagher v. Bishop*, 15 Wis. 276; *Bryant v. Osgood*, 52 N. H. 182; *Nichols v. Patten*, 18 Me. 231; *Waterhouse v. Smith*, 22 Me. 337; *Rand v. Sargent*, 23 Me. 326; *Fernald v. Chase*, 37 Me. 289.

⁴ *O'Connor v. Gidday*, 63 Mich. 630 (30 N. W. 313); *Hatch v. Fowler*, 28 Mich. 205; *Quackenbush v. Henry*, 42 Mich. 75.

tained against him for it.¹ A writ of replevin will not lie except against a party who takes and retains possession; and when an officer has fully executed a previous replevin writ and has no further control of the property in controversy, a suit in replevin cannot be maintained against him.²

§ 63. **Levy without possession is no ground for replevin.** Where a constable has levied upon personal property in possession of the judgment debtors, but has never taken it into his own possession or in any way interfered with their possession, the judgment debtors cannot maintain replevin against the constable. Replevin lies only by one out of possession to obtain possession from one having the possession.³

§ 64. **Replevin will not lie against one who is not detaining** the property when the writ is sued out. It is the condition of things *when* the suit is *commenced* which furnishes the ground for the action.⁴ It is strictly a possessory action, and it lies only in behalf of one entitled to possession, against one having, at the time the suit is begun, actual or constructive possession and control of the property.⁵ Replevin does not lie against one who is not unlawfully detaining the property at the time the affidavit for the writ is sworn to and the writ delivered to the officer. So *held*,

¹ *Crum v. Elliston*, 33 Mo. App. 591; *Davis v. Randolph*, 3 Mo. App. 454; *Haeger v. Marcus*, 5 Mo. App. 565.

² *Boyden v. Frank*, 20 Bradw. (Ill.) 169; *Goff v. Harding*, 48 Ill. 148. In this case the sheriff had levied an execution on property and turned it over to the judgment debtor on a delivery bond, and it was held replevin would not lie against the sheriff.

³ *Bacon v. Davis*, 30 Mich. 157; *Hickey v. Hinsdale*, 12 Mich. 99. See *Morrison v. Lombard*, 48 Mich. 548 (12 N. W. 696).

⁴ *Aber v. Bratton*, 60 Mich. 357 (27 N. W. 564); *Myers v. Credle*, 63 N. C. 504.

⁵ *Mitchell v. Roberts*, 50 N. H. 486; *Brockway v. Burnap*, 12 Barb. 347; *King v. Orser*, 4 Duer. 431; *Roberts v. Randel*, 3 Sandf. 707; *Knapp v. Smith*, 27 N. Y. 281; *Richardson v. Reed*, 4 Gray, 442; *Coffin v. Gephart*, 18 Iowa, 256.

where the writ was sworn out and held until defendant could be caught in temporary possession.¹

§ 65. **Mere acts of ownership insufficient.** Mere acts of ownership on the part of the defendant without manual possession will not suffice to support replevin. There must be an actual taking or an actual detention.² It will not lie in favor of one who is already in possession, nor can it be maintained against one who does not detain the possession of the property;³ nor against a party who has never had the goods in his possession or under his control, though he may be liable in trespass *de bonis asportatis*.⁴

§ 66. **Exception where property in defendant's possession wrongfully transferred.—Different rule by statute.** Where the property was in defendant's possession and wrongfully transferred by him shortly before the commencement of the action, or where the statute allows the replevin action to proceed as one for damages if the property is not taken, the rule is different. In Michigan the action has been allowed to proceed under their statute even where the defendant pointed out part of the property named in the writ and plaintiff refused to take possession of it. In the same action it was also held that plaintiff under such circumstances was not bound to give a forthcoming bond.⁵ But of course the only

¹ Burt v. Burt, 41 Mich. 82.

² Wallace v. Brown, 17 Ark. 449.

³ Hove v. McHenry, 60 Iowa, 227 (14 N. W. 301). In this case a mortgagee brought replevin against an officer who he supposed had levied on the property mortgaged, but it turned out that the officer had left it in the hands of the execution defendant, the mortgagor taking from him a delivery bond therefor, and had not taken manual possession of the property. Libby v. Murray, 51 Wis. 371 (8 N. W. 238); Bacon v. Davis, 30 Mich. 157.

⁴ Richardson v. Reed, 4 Gray, 441; Johnson v. Garlick, 25 Wis. 705; Gallagher v. Bishop, 15 Wis. 276; Dudley v. Ross, 27 Wis. 679; Grace v. Mitchell, 31 Wis. 533.

⁵ McBrien v. Morrison, 55 Mich. 351 (21 N. W. 368). The Michigan statute provides that if the property specified "shall not be found or shall not be delivered to the plaintiff," he may proceed to recover the same, or its value. Comp. L. § 6738, or How. Stat. § 8327, and if plain-

result of the suit under such circumstances would be a money judgment. Replevin will lie, although the defendant has parted with the possession of the property, and it has passed beyond the reach of the process of the court.¹ The action of replevin cannot be brought against one not in possession, and who cannot deliver the property, unless he has concealed, removed, or disposed of it, with the intent of avoiding the writ. It will not lie against a pledgee of property who has made a *bona fide* sale and delivery to a third party, who is in actual possession when the writ is sued out and so informs plaintiff, nor for property destroyed.² Cattle in the possession of a constable were replevied by the owner. After the constable had given an undertaking which entitled him to have the cattle returned to him, the replevin suit was dismissed, but the cattle never actually returned to him, and he refused to accept the delivery upon any condition, and disclaimed possession. *Held*, that the owner could not maintain a second action of replevin against the constable.³

§ 67. **Where only part of the property is taken.** Although the statutes of most states allow the action of replevin to proceed, where the property is not seized, as a suit for damages, still it is not the proper remedy in every instance where trover, detinue, or case is appropriate, but should only be brought where there is a reasonable probability that the property can be seized. If, then, the property is not seized through no fault of plaintiff, the action proceeds as an action for damages; or if only part of the property be taken,

tiff does not give bond, the property shall be, if taken, returned to the person from whom it was taken. Comp. L. § 6736; *Brockway v. Burnap*, 16 Barb. (N. Y.) 309.

¹ *Barnett v. Selling*, 3 Abb. New. Cas. 83; *Id.* 54, How. Pr. 118. In New York this is allowed by statute, and the defendant may be arrested if he has sold the property with intent to thwart the replevin. § 550, Code.

² *Gildas v. Crosby*, 61 Mich. 413 (28 N. W. 153).

³ *McHugh v. Robinson*, 71 Wis. 565 (37 N. W. 426); *Libby v. Murray*, 51 Wis. 371 (8 N. W. 238). See also *Brockway v. Burnap*, 12 Barb. 347.

it may proceed as replevin for that part and as damages for the part not taken.¹ But it is a possessory action, and will not lie for property which is held in trust by defendant for plaintiff as a mere security for the payment of what the latter owes the former.²

§ 68. Replevin has been held to be or not to be the proper form of action in cases depending upon particular facts, and not on any established rule.³

¹ *Krosmopolski v. Paxton*, 58 Miss. 581.

² *Adriance v. Rutherford*, 57 Mich. 170 (23 N. W. 718).

³ *Smith v. Crockett*, Minor (Ala.), 277; *Page v. Crosby*, 24 Pick. (Mass.) 211; *Duncan v. Green*, 6 Gill. (Md.) 478; *Karthaus v. Owings*, 4 Har. & J. (Md.) 263; *Southwick v. Smith*, 29 Me. 228; *Amos v. Sinnott*, 5 Ill. (4 Scam.) 440; *Dixon v. Hancock*, 4 Cush. Mass. 96; *Taylor v. True*, 27 N. H. 220; *Byron v. Crippen*, 4 Gray (Mass.), 312; *Simpson v. McFarland*, 18 Pick. Mass. 427; *Stevenson v. Ridgely*, 3 Har. & J. (Md.) 281; *Daniel v. Daniel*, 6 B. Mon. (Ky.) 230; *Jackson v. Hale*, 14 How. 525; *United States v. Kennan*, Pet. (C. C.) 168; *Gest v. Cole*, 2 Nott. & M. (S. C.) 456; *Pott v. Oldwein*, 7 Watts (Pa.), 173; *Brown v. Caldwell*, 10 Serg. & R. (Pa.) 114; *Chapman v. Andrews*, 3 Wend. (N. Y.) 240; *Harrison v. McIntosh*, 1 Johns. (N. Y.) 380; *Harwood v. Smithurst*, 29 N. J. L. (5 Dutch) 195; *Smith v. Huntington*, 3 N. H. 76; *Broadwater v. Darm*, 10 Mo. 77; *Dillon v. Wright*, 7 J. J. Marsh (Ky.), 10; *Talbert v. De Forrest*, 3 Iowa, 586; *Morris v. Cannon*, 1 Harr. (Del.) 220.

CHAPTER V.

WHAT PROPERTY MAY BE REPLEVIED.

	Section.		Section.
What may be replevied — ex-		When check, lease, or private	
amples	69	papers can be	76
Will lie for wild animals once		Stock or corporate property	
in actual possession	70	may be by custodian only,	
Does not lie for a corpse after		not by stockholders	77
interment	71	Parish records may be	78
Money is not the subject of an		Title deed may be	79
action of replevin	72	Scrip cannot be	80
Must be for certain specific arti-		County warrant can—Chose in	
cles	73	action	81
A life insurance policy may be		Property must be <i>in esse</i> at	
the subject of replevin	74	commencement of the action	82
So may public records—The		Property must be capable of	
seal of a court and the fee		seizure and delivery	83
book	75		

§ 69. **What may be replevied.** The old rule was that replevin would lie for anything that could be distrained.¹ but the rule now is that any personal property may be the subject of replevin. The exceptions or modifications of this rule—if such they may be called—are due to the efforts of the courts to keep the issue triable in this form of action within certain limits. Thus one partner cannot replevin partnership personal property, because if this were allowed the settlement of the partnership business would be brought about by replevin instead of in equity. The title to real estate cannot be tried in a replevin suit. And property not in existence when the writ issued cannot be replevied. But with these few limitations all species of animate, inanimate, tangible, movable property may be the subject of re-

¹ Bacon's Abridg.—Title Replevin.

plevin.¹ The following citations will give a general idea of the general scope of the decisions on this subject. For the law on the modifications of the rule, the reader is referred to the special chapters on those subjects. Bonds may be replevied.² Standing corn and wheat may be replevied.³ Growing trees become subject to replevin as soon as severed from the freehold.⁴ For a house unlawfully removed from the land whereon it stood.⁵ For cattle taken *damage feasant* when the impounder does not comply fully with the law.⁶ For a promissory note which has been paid but not delivered up.⁷ For runaway slaves by the lessee of their labor.⁸ For a billiard table.⁹ For an insurance policy.¹⁰ For a title deed.¹¹ The records of a corporation.¹² For vouchers and statement of account.¹³ A writ of replevin is for the delivery of personal property only.¹⁴

§ 70. **Will lie for wild animals once in actual possession.** To acquire property in animals, birds, and fishes which are wild by nature, one must have them in actual possession, custody, and control; and this he may do by training, domestication, or confining. Where a woman had a canary which she had had about two years, and which knew

¹ Eddy v. Davis, 35 Vt. 248; Groff v. Shannon, 7 Iowa, 508; Roberts v. The Dauphin Bank, 19 Pa. St. 75; Bower v. Tallman, 5 Watts & S. 556; Ricketts v. Dorrel, 55 Ind. 470; Vausse v. Russell, 2 McCord (S. C.), 329; Eaton v. Southby, Willes, 131.

² Douglas v. Wolf, 6 Kas. 88; Sager v. Blain, 44 N. Y. 445.

³ Simpson v. De Haven, 93 Ind. 411; Mallock v. Fry, 15 Ind. 483; Garth v. Caldwell, 72 Mo. 622; 2 Schouler Per. Prop. 468. See Chap. XVI.

⁴ Brewer v. Fleming, 51 Pa. St. 102. See Chap. XVI.

⁵ Ogden v. Stock, 34 Ill. 523. See Chap. XVI.

⁶ Kimball v. Adams, 3 N. H. 182; Brown v. Smith, 1 N. H. 36. See Chap. XV.

⁷ Savery v. Hoys, 20 Iowa, 25. See § 76.

⁸ Brooke v. Berry, 1 Gill. (Md.) 153.

⁹ Clark v. Griffith, 24 (N. Y.) 595.

¹⁰ Harris v. Harris, 43 Ark. 535.

¹¹ Wilson v. Rybolt, 17 Ind. 391. See § 79.

¹² South Plank v. Hixon, 5 Ind. 165. See § 77.

¹³ Drake v. Auerbach, 37 Minn. 505 (35 N. W. 367.)

¹⁴ Roberts v. Dauphin, &c., 19 Pa. St. 71.

its name and would answer the call of its owner, held that on its disappearance and being taken possession of by another, an action for its recovery would lie.¹ Replevin will lie for a reclaimed mocking-bird against one detaining it from the possession of the one who reclaimed it.²

§ 71. **Does not lie for a corpse after interment.** Replevin will not lie for a coffin interred in the ground and its contents, when those contents are a corpse. When a coffin, with the consent of all persons having any pecuniary interest in it, has been deposited in the earth for the purpose of interment, with a corpse inclosed within it, it is no longer an article of merchandise, and no right to the corpse remains except to protect it from insult.³

§ 72. **Money is not the subject of an action of replevin,** unless it is marked or designated in some manner, so as to become specific as regards the power of identification, such as being in a bag or package.⁴

§ 73. **Must be for certain specific articles.** To maintain an action to recover personal property, the plaintiff must show a present right to certain specific property: thus, where he brought replevin for ten new buggies as a mortgagee, and the defendant had more than ten new buggies, *held*, that the action would not lie.⁵ So where replevin was brought for three bales of cotton, when defendant had many bales, *held*, that it would not lie, as description was too

¹ Manning v. Mitcherson, 69 Ga. 447.

² Haywood v. The State, 41 Ark. 479. See Buster v. Newkirk, 20 Johns. 75; Goff v. Kilts, 15 Wend. 550; Amory v. Flynn, 10 Johns. 103.

³ Guthrie v. Weaver, 1 Mo. App. 136. See Wynkoop v. Wynkoop, 42 Penn. 293, but still such a right of property exists in the coffin as to support a charge of larceny for stealing it. State v. Doepke, 5 Mo. App. 489.

⁴ Hamilton v. Clark, 25 Mo. App. 428; Ames v. Miss. Boom Co. 8 Minn. 467; Sager v. Blain, 44 Hand. (N. Y.) 445; Skidmore v. Taylor, 29 Cal. 619; Pelkington v. Trigg, 28 Mo. 95; Blackstone Com. Vol. 2, p. 151; Bull. Nisi Prius R. 32; Dows v. Bignall, Labor Supt. (N. Y.) 408; Coris Case, Dyer, 22b; Sharon v. Nunan, 63 Cal. 234; Griffith v. Bogardus, 14 Cal. 410.

⁵ Blakely v. Patrick, 67 N. C. 40.

indefinite.¹ So an action for a certain number of bushels of corn will not lie when the corn is still ungathered, standing in the field, and several parties have an interest in the crop.² Replevin lies for specific property only, and cannot be maintained for an undivided share.³ Replevin lies for specific property capable of identification and actual return, and cannot be maintained for an undivided interest or share, except in cases of fraud or wrongful confusion of the property.⁴ Where the tenant agreed to pay as rent a share of the grain delivered in the half bushel, it was held that replevin would not lie until so delivered.⁵ Standing corn is personal property and may be replevied.⁶

§ 74. **A life insurance policy may be the subject of replevin.** A life insurance policy was replevied by the insured from his wife's (the beneficiary's) bailee, but no question seems to have been raised as to whether or not it was repleviable; though the court express some doubts on that point, they affirm the lower court.⁷

§ 75. **For the seal of a court and the fee book—Public records.** Replevin lies for the seal of a court and a fee book, by the clerk and proper custodian.⁸ But replevin is not the proper remedy to obtain possession of papers filed in a public office. The custody of such papers belongs to the officer in charge, and mandamus to compel the custodian to deliver them up to the owner is the only safe process.⁹

¹ *McDaniel v. Allen*, 99 N. C. 135 (5 S. E. 737).

² *Jones v. Dodge*, 61 Mo. 368.

³ *Low v. Martin*, 18 Ill. 286.

⁴ *Stanley v. Robinson*, 14 Bradw. (Ill.) 480. This was for lumber, no part of which had been delivered, and the exact amount to be delivered had not been agreed upon yet. See also *McEldury v. Flannigan*, 1 How. and Gie, 308; *Hart v. Fitzgerald*, 2 Mass. 569; *Gardner v. Deitch*, 9 Mass. 427; *Reynolds v. McCormick*, 62 Ill. 412.

⁵ *Lacy v. Weaver*, 49 Ind. 373; *Williams v. Smith*, 7 Ind. 559.

⁶ *Matlock v. Fry*, 15 Ind. 483.

⁷ *Harris v. Harris*, 43 Ark. 535.

⁸ *Fleutge v. Priest*, 53 Mo. 540.

⁹ *La Grange v. The State Treasurer*, 24 Mich. 469.

The archives of any department are not in the possession of the head of the department, chief of bureau, or clerk under either, for the time being, but in the possession of the United States. Hence, a party cannot by writ of replevin against such head of department, or other public officer, take papers from the public archives on the allegation of their being his private property.¹ It will not lie to remove public papers or documents from a public office. Such instruments are in the custody of the sovereign power, and the writ, if issued for their seizure, will be quashed when the facts appear to the court and the papers returned. Neither can a person try the title to a public office by replevin. He cannot replevin his commission when made out and ready for delivery, as this would be to try the right to the office. The value of a public office cannot be ascertained in replevin or awarded in damages.²

§ 76. **When check, lease, or private papers can.** A lease of itself is not the subject of replevin.³ Where a check has been obtained by false representations and the money obtained upon it, and the check returned to the drawer, and was in his possession, *held*, that an action of replevin for it could not be sustained. It has no value.⁴ Private papers may be replevied.⁵ It lies for vouchers and statement of

¹ *Brent v. Hagner*, 5 Cranch. (C. Ct.) 71.

² *Marbury v. Madison*, 1 Cranch. (U. S.) 49.

³ *Nichols v. Mase*, 94 N. Y. 160.

⁴ *Barnett v. Selling*, 3 Abb. New Cas. 83. As to replevin for securities, see *Schreoppel v. Corning*, 5 Den. 236; *Clowes v. Hawley*, 12 Johns. 484; *Hodges v. Lathrop*, 1 Sandf. 46; *Kuehne v. Williams*, 1 Duer. 597; *Murray v. Burling*, 10 T. R. 172. The *Barnett* case above referred to is also reported in 70 N. Y. 492. The replevin seems to have been brought in that case not to get the check, but to get an order of arrest for the defendant in replevin who drew the check—under New York Code, 1851, § 179, Subd. 3.

⁵ *Gibbs v. Usher*, 1 Holmes, 348 (1st circ.) This was an indenture of lease. The decision is based on the interpretation of the Massachusetts statute (17 Stat. 196), 1870.

account.¹ But a note or check may be replevied by the legal owner.²

§ 77. **Stock or corporate property may be by custodian only, not by stockholder.** Property of a corporation cannot be replevied by a stockholder in his own name, even if he owns all of the stock.³ The president of a corporation cannot maintain a possessory warrant in his own name to recover possession of corporate property of which he has had no prior possession either as an officer or an individual.⁴ The proper officer or agent who is the custodian of the stock or property of a corporation may bring replevin for it in his official capacity.⁵

§ 78. **Parish records may be replevied by proper custodian.**⁶

§ 79. **Title deeds may be replevied.**⁷ But replevin will not lie for the recovery of a deed, where there is a question whether it was delivered or not, and the title to the land will be involved in the action; title cannot be tried this way. In replevin for a deed, its value must be proved.⁸

§ 80. **Scrip.** A party cannot recover scrip by replevin. If he desires the identical scrip, his remedy is in equity.⁹

§ 81. **County warrant—Chose in action.** Replevin lies for an unindorsed county warrant. The difficulties in

¹ *Drake v. Auerbach*, 37 Minn. 505 (35 N. W. 367).

² *Clapp v. Shepard*, 2 Met. 127; *Chickering v. Raymond*, 15 Ill. 363; *Bessell v. Drake*, 19 Johns. 66; *Graff v. Shannon*, 7 Iowa, 508.

³ *Button v. Hoffman*, 61 Wis. 20 (20 N. W. 667); *Bartlett v. Brickett*, 14 Allen, 62; *Taylor on Private Corp.* § 187.

⁴ *McEvoy v. Hussey*, 64 Ga. 314.

⁵ *South v. Hixon*, 5 Ind. 165.

⁶ *Baker v. Fales*, 16 Mass. 147; *Lawyer v. Baldwin*, 11 Pick. 192; *Sudbury v. Stearns*, 21 Pick. 148.

⁷ *Wilson v. Rybolt*, 17 Ind. 391.

⁸ *Flannigan v. Goggins*, 71 Wis. 28 (36 N. W. 846).

⁹ *Wheeler v. Allen*, 49 Barb. (N. Y.) 460, but this seems to have been decided on the title of plaintiff rather than on the character of the property.

taking the chose in action does not affect the right to the remedy.¹

§ 82. **Property must be in esse at commencement of the action.** It will not lie for property destroyed and not in existence at the commencement of the action,² nor for property which has been destroyed before demand made or suit commenced;³ nor for the young which animals are expected to produce.⁴ But judgment may be rendered for animals born pending the litigation over the possession of their parents,⁵ or any product of the animals, as their wool or butter.⁶

§ 83. **Property must be capable of seizure and delivery.** It will not lie for clothes or ornaments actually worn on the person, though for the purpose of preventing replevin,⁷ nor will it lie for an apprentice at the suit of his master.⁸ It will not lie for an article manufactured to order until completed.⁹ It cannot be employed to quiet the title to property already in plaintiff's possession.¹⁰

¹ *Saunders v. Jordan*, 54 Miss. 428. See *Emery v. Cobbe*, 26 Neb. (43 N. W. 410).

² *Burr v. Dougherty*, 21 Ark. 559; *Caldwell v. Fenwick*, 2 Dana, Ky. 333.

³ *Gildas v. Crosby*, 61 Mich. 413 (28 N. W. 153); *Scott v. Elliott*, 63 N. C. 215.

⁴ *Lindsay v. Perry*, 1 Ala. 203; *Chissom v. Hawkins*, 11 Ind. 318; *McCarty v. Blevins*, 5 Yerger (Tenn.), 196.

⁵ *Buckley v. Buckley*, 12 Nev. 426.

⁶ *Arundel v. Trevil*, 1 Sid. 81.

⁷ *Maxham v. Day*, 16 Gray (Mass.), 213.

⁸ *Morris v. Cannon*, 1 Harr. (Del.) 220.

⁹ *Pettingill v. Merrill*, 47 Me. 109.

¹⁰ *Bacon v. Davis*, 30 Mich. 157; *Hickey v. Hinsdale*, 12 Mich. 100; See on general subject, *Brockway v. Burnap*, 16 Barb. (N. Y.) 309.

CHAPTER VI.

WHAT TITLE WILL SUPPORT THE ACTION.

	Section.		Section.
Peaceful possession is good evidence of title	84	not on the weakness of the defendant's	99
The possession must be under a claim of right	85	An equitable title alone will not support replevin . .	100
Special property with actual possession	86	A special property interest in, is sufficient	101
Absolute possession	87	The same—Illustrations . .	102
Just what right of possession will support replevin . . .	88	A holder of a bill of lading . .	103
The interest sufficient to maintain trover is sufficient . .	89	A lien for advances	104
As against a wrongdoer, prior possession alone sufficient . .	90	An auctioneer	105
Ownership alone without possession not	91	Possession parted with conditionally—Bailor	106
The right of exclusive possession, coupled with an interest	92	Abortive sale	107
Paramount title is not necessary as against trespassers and wrongdoers	93	Possession by an agent . . .	108
Right to the possession indispensable to maintain the action	94	Possession of a stray for the statutory time will support it	109
Difference between action against stranger and general owner	95	Officers' possession after levy sufficient	110
An after-acquired interest will not support replevin . . .	96	One entitled to possession for temporary purpose can replevy from general owner . .	111
And the right of possession must also continue to the close	97	Where title is reserved by seller, his interest is sufficient to support replevin . .	112
Right of possession at some former time cannot be tried . .	98	Symbolical delivery sufficient . .	113
Plaintiff must recover on strength of his own title,		Right of property in fire company, band, and other voluntary organizations . .	114
		Certain special interests held not sufficient to maintain replevin—Illustrations . .	115
		Neither is a landlord's lien . .	116
		One tenant in common cannot . .	117
		Statute of frauds—Title based on, insufficient	118

	Section.		Section.
Title by gift insufficient . . .	119	not such an interest, for this reason, as will support replevin	126
Title based upon promise by infant insufficient	120	Title to a half interest will not do	127
A lien without the right of possession will not support replevin	121	Proof of title without right to possession not sufficient . .	128
Right to cut trees will not support replevin for trees cut by another	122	A right based on a special law must comply with the terms of the law strictly	129
Title based on pretended but illegal judicial sale will not .	123	To the right of property plaintiff must add the right of possession	130
Title based on an unexecuted or conditional contract . .	124	While possession is <i>prima facie</i> title, it is not good against a superior title	131
One who has placed the title in another is estopped . .	125		
Surety on undertaking has			

§ 84. Peaceful possession is good evidence of title. Where on the trial the plaintiff shows peaceful possession in himself prior to the taking by defendant, he has gone far to establish his right to the property, and the burden is on defendant to show that his taking was rightful.¹ If the plaintiff can show an undisputed possession under a claim of ownership for a long time, it will entitle him to recover against a defendant who has wrongfully deprived him of the possession unless he shows something more than a bare assertion of title.²

§ 85. The possession must be under a claim of right and acquired without force or fraud,³ but need not be under a claim of absolute ownership. In general, it may be said that anyone having a legal right to the possession of personal property may bring replevin, and it matters not

¹ Shomo v. Caldwell, 21 Ala. 448; Robinson v. Calloway, 4 Ark. 100; Sprague v. Clark, 41 Vt. 6; Dixon v. Thatcher, 14 Ark. 141.

² Smith v. Graves, 25 Ark. 461; 2 Greenl. Ev. 637; Morris v. Danielson, 3 Hill, 168; Hunt v. Chambers, 1 Zab. (21 N. J.) 624.

³ Halliday v. Lewis, 15 Mo. 406; Hatch v. Fowler, 28 Mich. 205; Bayless v. Lefaiivre, 37 Mo. 120; Siemmons v. Austin, 36 Mo. 308; Perley v. Foster, 9 Mass. 114; Bond v. Padelford, 13 Mass. 395; Harris v. Smith, 3 S. & R. 23; Stanley v. Gaylord, 1 Cush. 536; Brownell v. Manchester, 1 Pick. 232; Mitchell v. Hinman, 8 Wend. 667.

whether that right be founded on a full claim of title or a less interest, so that the right to possession be clear and rightful.

§ 86. **Special property with actual possession** or even the right to possession is sufficient to maintain the action against one who wrongfully seizes and removes it.¹ It is sufficient if the plaintiff have either a general property or a special property coupled with an interest in the chattel sought to be replevied, and be entitled to the possession of it at the time the action is brought.²

§ 87. **Absolute possession** of property, combined with absolute right to it, except as against some person other than the defendant, between whom and the owner of the property no privity is shown to exist, will entitle a plaintiff to maintain his action.³ But, of course, if plaintiff's title is denied by the pleadings, naked proof of possession would not make a case for him; he must show something (some title) on which to base a lawful possession.⁴

¹ Johnson v. Carnley, 10 N. Y. 570; Frost v. Mott, 34 N. Y. 253; Walpole v. Smith, 4 Blackf. 304; Mead v. Kilday, 2 Watts (Pa.), 110; Halliday v. Lewis, 15 Mo. 403; Kirby v. Miller, 4 Colder (Tenn.), 3; Cox v. Morrow, 14 Ark. 603; Gillet v. Treganza, 6 Wis. 343; Shaddon v. Knott, 2 Swan (Tenn.), 358; (58 Am. Dec. 63); Harlan v. Harlan, 15 Pa. St. 507; (53 Am. Dec. 612).

² Sprague v. Clark, 41 Vt. 6; Baker v. Fales, 16 Mass. 147; Curdy v. Brown, 1 Duer. (N. Y.) 101; Rockwell v. Saunders, 19 Barb. 473; Moorman v. Quick, 20 Ind. 67; Gartside v. Nixon, 43 Mo. 138; Frizell v. White, 27 Miss. 198; Alden v. Carver, 13 Iowa, 253; Prater v. Frazier, 11 Ark. 249; Bayard v. Jones, 9 Humph. (Tenn.) 739; Hatch v. Fowler, 28 Mich. 205; Spenceer v. Roberts, 42 Conn. 75; Sanford Mfg. Co. v. Wiggin, 14 N. H. 441 (40 Am. Dec. 198).

³ Johnson v. Carnley, 10 N. Y. (6 Seld.) 570.

⁴ Gartside v. Nixon, 43 Mo. 138; Gray v. Parker, 38 Mo. 160; Harrison v. McIntosh, 1 Johns. 380. See Ludden v. Leavit, 9 Mass. 104; Perley v. Foster, 9 Mass. 112; Whitwell v. Wells, 24 Pick. 25; Walcott v. Pomeroy, 2 Pick. 121; Fairbank v. Phelps, 22 Pick. 538; Waterman v. Robinson, 5 Mass. 303; Dixon v. Hancock, 4 Cush. 96; Hill v. Freeman, 3 Cush. 260; Davidson v. Waldron, 31 Ill. 120; Clark v. West, 23 Mich. 242; Belden v. Laing, 8 Mich. 503; Campbell v. Williams, 39 Iowa, 646; Warren v. Leland, 9 Mass. 265; Mitchell v. Roberts, 50 N. H. 486;

§ 88. Just what right of possession will support *replevin* it is difficult to say. Ownership or title are not necessarily involved, but may be. Where title is involved, the better title will prevail, and the legal title will prevail over the equitable.¹ And where the question of title is put in issue, and the right to possession is to be determined by the question of title, the burden is on plaintiff to show a superior title in himself.² Where the title is wholly between the plaintiff and defendant, the question is, Which has the better title?³ The one having the legal title is ordinarily entitled to possession, and where the legal title and the right to possession are in the same person, the question involved is not difficult, but where the legal title and right to possession for the time are in different persons, perplexing questions frequently arise. Where the plaintiff claims a right of possession only as distinct from the title, as in case of a bailee, a lessee, or a lienholder, etc., he may recover against the general owner if his right be clear and exclusive. Such a right to possession is generally spoken of as a "special property" by the statutes. "Special property," Greenleaf says, "in a strict sense, may be said to consist in the lawful custody of property, with a right of detention against the general owner. But a lower degree of interest will sometimes suffice against a stranger or wrongdoer. For a wrongdoer is not permitted to question the title of one in actual possession of goods whose possession he has invaded."⁴

Wallace v. Brown, 17 Ark. 450; Hill v. Robinson, 16 Ark. 92; Britt v. Aylett, 6 Eng. (Ark.) 476; Parham v. Riley, 4 Cold. (Tenn.) 5.

¹ Heyland v. Badger, 35 Cal. 404; Reese v. Harris, 27 Ala. 306; Kilion v. Carrol, 13 Ired. (N. C.) 431; Bergesch v. Keevil, 19 Mo. 128; Warner v. Matthews, 18 Ill. 83; Rogers v. Arnold, 12 Wend. 30.

² Hatch v. Fowler, 28 Mich. 206; Patterson v. Fowler, 22 Ark. 398; Simcoke v. Frederick, 1 Ind. 54; Hallett v. Fowler, 8 Allen, 93; Drayton v. Waldron, 31 Ill. 120; Daws v. Green, 32 Barb. 490; Burns v. Bartlett, 15 Pick. 75; Bogard v. Jones, 9 Hump. (Tenn.) 739; Fowler v. Down, 1 Bos. & Pull. 44.

³ Bartlett v. Goodwin, 71 Me. 350.

⁴ Greenleaf on Ev. 637; Eisendrath v. Knauer, 64 Ill. 402; Wilson v.

§ 89. **The interest sufficient to maintain trover** is sufficient to maintain replevin.¹ The rule is similar to that in trespass *de bonis asportatis*. The action cannot be supported unless the plaintiff have the actual or constructive possession of the goods, or a general or special property in them, with the right to immediate possession when the injury was committed. It is not essential that the plaintiff should ever have had the actual possession, but he must have had such a title that he was authorized to reduce the goods to his possession at the commencement of his suit.²

§ 90. **As against a wrongdoer, prior possession alone is sufficient** to enable the plaintiff to maintain replevin.³ A right to the possession of the thing sued for is sufficient to maintain replevin.⁴ A person entitled to possession without title may maintain replevin against one who withholds the possession.⁵ Possession alone will entitle one to maintain detinue against a wrongdoer, and the right of possession, accompanied by a lien for money advanced, or for a debt previously contracted, entitles the plaintiff to maintain the action against any one disturbing his possession.⁶ As against a mere wrongdoer, and those claiming under him,

Royston, 2 Ark. 315; Wallace v. Brown, 17 Ark. 450; L. S. & M. S. R. R. v. Ellsey, 85 Pa. 283.

¹ Rich v. Ryder, 105 Mass. 306; 3 Steph. (N. P.) 2485.

² Putnam v. Wyley, 8 Johns. 432; Lunt v. Brown, 13 Me. 236; Cannon v. Kinney, 3 Scam. 9; Heath v. West, 8 Foster (N. H.), 101; Hume v. Tufts, 6 Blackf. 136; Muggridge v. Eveleth, 9 Met. 233; Boise v. Knox, 10 Met. 40; Bell v. Monahan, Dudley (S. C.), 38; Crenshaw v. Moore, 10 Geo. 384.

³ Van Namee v. Bradley, 69 Ill. 299; Rogers v. Arnold, 12 Wend. 37; Hammond v. Mead, 1 Hill, 204; Johnson v. Carnly, 10 N. Y. 570; Wheeler v. McCorrister, 24 Ill. 40; 1 Smith's Lead Cas. Vol. I. p. 648 (7 Am. Ed.); Dickson v. Mathers, Hempst. 65; Cobb v. Megrath, 36 Ga. 625; Clark v. Hieck, 17 Ind. 281; Byrd v. O'Houlin, 1 Mill (S. C.), 401.

⁴ Saunders v. Jordan, 54 Miss. 428.

⁵ Prater v. Frazier, 11 Ark. 249.

⁶ Gafford v. Stearns, 51 Ala. 434; Dozier v. Joyce, 8 Porter, 303; Stoker v. Yerby, 11 Ala. 332; Miller v. Jones, 26 Ala. 247; Bryan v. Smith, 22 Ala. 534; Desha v. Pope, 6 Ala. 690.

detinue may be maintained on proof of prior possession.¹ One, though not the owner, entitled to the possession of personal property, may maintain replevin against a party who cannot show a better right to it.² *Prima facie* right to the property is sufficient against all who do not prove a better title.³

§ 91. **Ownership alone without possession** is not sufficient to support the action. The action is possessory, and ownership is only incidental to the main issue.⁴

§ 92. **The right of exclusive possession, coupled with an interest** or special property in a chattel, is sufficient to maintain replevin for it against one wrongfully taking or detaining it, though a third person has, at the time, a common or sole property in the chattel.⁵ But a *prima facie* title is better than possession.⁶

¹ *Wortham v. Gurley*, 75 Ala. 356; *Huddleston v. Huey*, 73 Ala. 215, *Jones v. Anderson*, 76 Ala. 427; *Shomo v. Caldwell*, 21 Ala. 448; *Miller v. Jones*, 26 Ala. 247; *Ruse v. Harris*, 27 Ala. 301.

² *Cox v. Fog*, 54 Vt. 446; *Sprague v. Clark*, 41 Vt. 6; *Tittmore v. Labounty*, 60 Vt. 624 (15 A. 196); *Chaffee v. Harrington*, 60 Vt. 718 (15 A. 350); *Lamotte v. Wisner*, 51 Md. 543; *Brommell v. Hart*, 12 Heis (Tenn.), 366.

³ *Ingersol v. Emmerson*, 1 Ind. 76; *La Fontain v. Green*, 17 Cal. 296; *Emmons v. Dowe*, 2 Wis. 322.

⁴ *Tomlinson v. Collins*, 20 Conn. 365; *Brown v. Chickopee Falls Co.*, 16 Conn. 87; *Johnson v. Neale*, 6 Allen, 228; *Neff v. Thompson*, 8 Barb. 213; *Tison's Admr. v. Bowden*, 8 Fla. 69; *Williams v. West*, 2 Ohio St. 83; *Smith v. Orser*, 43 Barb. 187; *Muggridge v. Eveleth*, 9 Met. 233; *Wade v. Mason*, 12 Gray, 335; *Bradley v. Michael*, 1 Cart. (Ind.) 552; *Pangburn v. Patridge*, 7 John. (N. Y.) 140; *Hotchkiss v. McVickar*, 12 Johns. 403; *Clark v. Skinner*, 20 John. (N. Y.) 465; *Hall v. Tuttle*, 2 Wend. 475.

⁵ *Stevens v. Chase*, 62 N. H. 340. In this case plaintiff leased land and stock on such terms that he had an interest in the increase of the stock; the heifer in question broke out of its pasture and into defendant's pasture; defendant refused to surrender it, claiming it as his; on plaintiff's bringing replevin, defendant claimed that the action should have been brought by one Thompson, the owner, and not the plaintiff, the lessor. See also *Mitchell v. Roberts*, 50 N. H. 486; *Marshall v. Davis*, 1 Wend. 109; *Dubois v. Harcourt*, 20 Wend. 41; *Rogers v. Arnold*, 12 Wend. 30.

⁶ *Rose v. Tolly*, 15 Wis. 443; *Beckwith v. Philleo*, 15 Wis. 224;

§ 93. **Paramount title is not necessary as against trespassers and wrongdoers,** to support the action; but a naked possession, or a right of possession coupled with a beneficial interest, will do.¹ As against a naked trespasser or wrongdoer, actual possession, or a right of immediate possession by the plaintiff, to the chattel, coupled with an interest, is sufficient to maintain the action.²

§ 94. **Right to the possession indispensable to maintain the action.** A general or special property, with the right to the immediate possession in the plaintiff, is always sufficient to enable him to maintain the action. The right to the possession at the time of bringing the action is essential to a recovery.³ It cannot be maintained without showing either a general or special property in the plaintiff, together with the immediate right of possession.⁴

§ 95. **Difference between action against stranger and general owner.** In Michigan one having a special or qualified property in the goods may maintain replevin for the whole against a stranger, but only for his interest against the general owner,⁵ and this doctrine is sound on principle.

§ 96. **An after acquired interest will not support repelvin.** The plaintiff must have the exclusive right to the possession at the commencement of the suit.⁶ But where

Pierce v. Stevens, 30 Me. 184; Southwick v. Smith, 29 Me. 229; School Dist. v. Lord, 44 Me. 384; Melton v. McDonald, 2 Mo. 45; Ramsay v. Bancroft, 2 Mo. 151; Bush v. Lyon, 9 Cow. 53; Warner v. Hunt, 30 Wis. 201; Eisendrath v. Knauer, 64 Ill. 402.

¹ Freshwater v. Nichols, 7 Jones (N. C. L.), 251; Armory v. Delamere, 1 Strang. (S. C.) 504 (Smith's Lead. Cas. 151); Rogers v. Arnold, 12 Wend. 37.

² Williams v. West, 2 Ohio, St. 82; Freshwater v. Nichols, 7 Jones (N. C. L.) 251; Bostick v. Brittain, 25 Ark. 482; Van Boalen v. Dean, 27 Mich. 104; Lehman v. Kellerman, 65 Pa. St. 489; Currier v. Ford, 26 Ill. 489; Van Namee v. Bradley, 69 Ill. 299; Hopper v. Miller, 76 N. C. 402; Allen v. Smith, 45 Ga. 84.

³ Britt v. Aylett, 11 Ark. 475 (52 Am. Dec. 282).

⁴ L. S. & M. S. R. R. v. Ellsey, 85 Pa. 283.

⁵ Davidson v. Gunsally, 1 Mich. 388.

⁶ McKennon v. May, 39 Ark. 442; Kingsbury v. Buchanan, 11 Iowa,

the plaintiff did not have the right of possession at the commencement of the action, but acquired such a right by the simple lapse of time before the trial, it was held that a return could not be ordered.¹ Where the facts develop that plaintiff had no right to the possession at the time of the levy, he cannot maintain the action, and it should be dismissed on motion of defendant.² To maintain replevin, plaintiff must have had the right of possession at the commencement of the action (and the filing of the affidavit and issuing of the writ is the commencement of the action) where plaintiff, at the filing of the affidavit, had possession of the sewing machine, except the stand, and returned the head and part he had to defendant before the levy of the writ, replevin will not lie.³ Where property was tendered back to plaintiff before the writ of replevin was served, *held*, to defeat the action.⁴ The plaintiff in replevin must prove a right to the possession at the time the action was commenced.⁵ In order to maintain an action for the recovery of chattels *in specie*, the plaintiff must have, as against the defendant, a present, unqualified right to the possession of the chattel, in

387; Hunt v. Chambers, 1 Zab. (21 N.J.) 623; Noble v. Epperly, 6 Port. (Ind.), 416; Barrett v. Turner, 2 Neb. 174; Dickson v. Mathers, Hempst. (U. S. C. C.) 65; Campbell v. Williams, 39 Iowa, 646.

¹ Ingraham v. Martin, 15 Me. 373; Barney v. Bronnson, 51 Conn. 175.

² Duncan v. Brennan, 83 N. Y. 487.

³ Wheeler & W. Mfg Co. v. Teetzlaff, 53 Wis. 211 (10 N. W. 155).

⁴ Kiefer v. Carrier, 53 Wis. 404 (10 N. W.) 562.

⁵ McIsaacs v. Hobbs, 8 Dana. (Ky.) 268; Sprague v. Clark, 41 Vt. 6; Shaddon v. Knott, 2 Swan. (Tenn.) 358; Bogard v. Jones, 9 Humph. (Tenn.) 739; Dodworth v. Jones, 4 Duer. (N. Y.) 201; McCurdy v. Brown, 1 Duer. (N. Y.) 101; Brockwell v. Saunders, 19 Barb. (N. Y.) 473; Gartside v. Nixon, 43 Mo. 138; Pilkington v. Trigg, 28 Mo. 95; Frizel v. White, 27 Miss. 198; Hill v. Robinson, 16 Ark. 90; Britt v. Aylett, 11 Id. 475; Walpole v. Smith, 4 Blackf. (Ind.) 304; Ingraham v. Martin, 15 Me. 373; Noble v. Eperly, 6 Ind. 414; Moorman v. Quick, 20 Ind. 67; Marienthal v. Shafer, 6 Iowa, 223; Alden v. Carver, 13 Id. 253; Smith v. Williamson, 1 Har. & J. (Md.) 147; Gates v. Gates, 15 Mass. 310; Collins v. Evans, 15 Pick. (Mass.) 63; Wheeler v. Train, 3 Id. 255; Baker v. Fales, 16 Mass. 147; Berthold v. Fox, 13 Minn. 501.

its present form, and hence, if there be any preliminary act or condition precedent to be performed, before the unqualified right of possession attaches, the action cannot be maintained.¹ So where chattels are sold at a public sale to be paid for by note, a purchaser cannot maintain replevin until he has tendered such a note as the terms of the sale require, or the money, with interest, that would become due on the note at its maturity.²

§ 97. **And the right to possession must continue to the close.** The plaintiff in replevin must have a right to the possession not only at the commencement of the suit, but at its termination as well. If his right is founded upon a lien, the tender of the amount of his lien and cost before the termination of the action terminates his right to maintain the suit.³

§ 98. **Right of possession at some former time cannot be tried.** The plaintiff's right to possession depends solely on his right at the commencement, and his right at a former time cannot be proved or questioned, except as it throws light upon or is drawn in question to arrive at a correct decision of the main question.⁴

§ 99. **Plaintiff must recover on strength of his own title, not on the weakness of the defendant's.** In an action for the recovery of personal property, the plaintiff must recover on the strength of his own title, and not upon the weakness of his adversary's. If a claimant of personal property has no title thereto, he cannot recover it from one in

¹ *Seals v. Edmondson*, 73 Ala. 295; *Kirkpatrick v. Snyder*, 33 Ind. 169; *Bailey v. Troxell*, 43 Ind. 432; *Moffatt v. Green*, 9 Ind. 198. As to what is, and what is not, an executory contract. See *Lester v. East*, 49 Ind. 588.

² *Wainscott v. Smith*, 68 Ind. 312.

³ *Le Flore v. Miller*, 64 Miss. 204 (1 So 99); *Helen v. Gray*, 59 Miss. 54.

⁴ *Harlan v. Harlan* 15 Pa. St. 513; *Alden v. Carver*, 13 Iowa, 254; *Stoughton v. Rappalo*, 3 S. & R. 562; *Shearick v. Huber*, 6 Benn. 3; *Hunt v. Strew*, 33 Mich. 85; *Herdie v. Young*, 55 Pa. St. 177; *Hatch v. Fowler*, 28 Mich. 210; *Morgner v. Briggs*, 46 Mo. 65.

possession claiming title by virtue of a sheriff's sale, although the sale was irregular.¹ If he fail on the strength of his own title, the possession ought to be restored to the defendant.² Plaintiff must recover, if at all, on his own title, and not on any defect or weakness in his adversary's.³ The plaintiff in a replevin suit cannot plead property in another to assist him. He must recover, if at all, on the strength of his own title. He may plead any qualified title, but it must be in himself.⁴

§ 100. **An equitable title alone will not support replevin.**⁵ In New Jersey, where the distinction between law and equity courts is still kept up, replevin will not lie by one having a title enforceable in equity only.⁶ Where a firm held a mortgage on a horse, a member of the firm cannot replevin the horse; his title is only equitable as a member of the firm.⁷ If the plaintiff has never had the actual possession of the property, he must show a valid and operative legal title in himself. At the commencement of the suit a possible or equitable title or interest is not sufficient title upon which to found the action.⁸

§ 101. **A special property interest in is sufficient to support replevin.**⁹ If plaintiff have a special property, or an

¹ *Eastern v. Fleming*, 78 Ind. 116; *Picquet v. McKay*, 2 Blackf. 465.

² *Reinheimer v. Hemingway*, 35 Pa. St. 432; *Stanley v. Neale*, 58 Mass. 343.

³ *Goodman v. Kennedy*, 10 Neb. 270 (4 N. W. 987).

⁴ *Holler v. Colson*, 23 Ill. App. 324.

⁵ *Gluck v. Cox*, 75 Ala. 310; *Jones v. Anderson*, 76 Ala. 427; but see *Bates v. Wiggins*, 37 Kan. 44 (14 P. 442).

⁶ *Woodruff v. Appgar*, 42 N. J. 198. This case arose on these facts: A husband sold property directly to his wife, but before she took possession of it, it was levied on for his debts, and she brought replevin, *held*, that her only remedy was in equity, and that replevin would not lie.

⁷ *Vinson v. Ardis*, 81 Ala. 271; *Hacker v. Johnson*, 66 Me. 21.

⁸ *Alabama Bank v. Barnes*, 82 Ala. 607.

⁹ *The City Bank v. R. W. & O. R. R.*, 44 N. Y. 136; *Dezell v. Odell*, 3 Hill (N. Y.), 215; *Miller v. Adsit*, 16 Wend. 335; *Wheeler v. McFarland*, 10 Wend. 318; *Rich v. Rider*, 105 Mass. 306; *National Bank v. Dearborn*, 115 Mass. 219; *Woods v. Nixon*, Add. (Pa.) 131.

interest of a temporary or limited nature in the property, and had actual possession of which he has been deprived by defendant, it is enough; he need not be absolute owner.¹ A general or special property in goods, accompanied with possession, either actual or constructive, is sufficient.²

§ 102. **Special property right sufficient—Illustration.** *The taker up of a stray* has such a qualified ownership as will support replevin.³

§ 103. **A holder of a bill of lading** for goods by the terms of which the goods are to be delivered to him may bring replevin if the delivery is refused.⁴

§ 104. **A lien for advances** upon property pledged for the security thereof is sufficient to support replevin against an officer attaching it for a debt of the lienor.⁵

§ 105. **An auctioneer** has sufficient interest to maintain replevin against one wrongfully interfering with his possession.⁶

§ 106. **Possession parted with conditionally—Bailor,** where a sheriff sold a boat upon condition that if the sale was held to be void the purchaser was to hold it as his bailee and the sale was held void, this title was held sufficient to support replevin.⁷

§ 107. **Abortive sale.** Where one had put into a boat part of the machinery, which was to be paid for when all in, and the master refused to pay for what was in or let the rest be put in, he was allowed to replevy the part put in.⁸

¹ Hazard v. Hall, 5 Mo. App. 584.

² Wilson v. Royston, 2 Ark. 315; Walpole v. Smith, 4 Blackf. (Ind.) 304; Cox v. Morrow, 14 Ark. 603; Holiday v. Lewis, 15 Mo. 403; Frost v. Mott, 34 N. Y. 253; Brockway v. Burnap, 12 Barb. (N. Y.) 347; Mead v. Kildoy, 2 Watts (Pa.), 110; Kerby v. Meller, 4 Coldw. (Tenn.) 3; Gillett v. Trequaza, 6 Wis. 343.

³ Barron v. Lands, 1 Dur. (Ky.) 299.

⁴ Powell v. Bradlee, 9 Gill. & J. (Md.) 220.

⁵ Currier v. Ford, 26 Ill. 488.

⁶ Tyler v. Freeman, 3 Cush. 261.

⁷ Scott v. Elliott, Phill. (N. C. L.) 104.

⁸ Kidd v. Beldin, 19 Barb. (N. Y.) 266.

§ 108. **Possession by an agent** is actual—not constructive—possession by the principal, and will support a possessory warrant by the latter against one who wrongfully and fraudulently takes possession thereof.¹

§ 109 **Possession of a stray for the statutory time will support it.** An adverse possession of a horse which has strayed from the original owner, for the full term of limitation, gives a good title thereto sufficient to sustain an action of replevin against the original owner.²

§ 110 **Officer's possession after levy sufficient.** After levy and appraisal by an officer, he has such a special property as will maintain replevin, though the goods levied on be left in the defendant's custody.³ But a mere paper levy is not sufficient.⁴ An officer who has actually levied has such an interest in the property that he can maintain replevin against one who interferes with his possession.⁵

§ 111. **One entitled to possession for temporary purpose can replevy from general owner.** One who has a temporary property in a chattel, and delivers it to the general owner for a special purpose, may, after that purpose is satisfied, and during his temporary right, maintain trover for it against the general owner.⁶ Part owner who has acquired the interest of the other part owner may maintain detinue against a bailee of the latter.⁷

§ 112. **Where title is reserved by seller his interest is sufficient to support replevin.** A wholesaler who sent beer in his own barrels to a retailer to be paid for as sold

¹ *Hillyer v. Brogden*, 67 Ga. 24.

² *Hicks v. Fluit*, 21 Ark. 463.

³ *Polite v. Jefferson*, 5 Harr. (Del.) 388; *Dunkin v. McKee*, 23 Ind. 447; *Martin v. Watson*, 8 Wis. 315.

⁴ *Johnson v. Prussing*, 4 Bradw. (Ill.) 575.

⁵ *Lockwood v. Bull*, 1 Cow. 322; *Dezell v. Odell*, 3 Hill, 215; *Lathrop v. Blake*, 3 Foster (N. H.), 56; *Broadwell v. Paradise*, 81 Ill. 474.

⁶ *Roberts v. Wyatt*, 2 Taunt. 268.

⁷ *Freeman v. Speegle*, 83 Ala. 191.

may maintain replevin against an officer who levies on it as the property of the retailer.¹

§ 113. **Symbolical delivery sufficient.** Where a person has advanced money on property which is not capable of actual delivery, but has had a symbolical delivery, as by a receipt or order therefor, he has sufficient possession and title to support replevin against an officer who attaches them under a writ against the general owner.² Such a transfer of title is *prima facie* only, and is subject to explanation.³ If the receipt or bill of lading or other evidence of title is accompanied by a draft, it is understood that the transfer of title is made subject to the amount shown by this draft, and it is a first lien on the property in the hands of the transferee in equity.⁴

§ 114. **Right of property in fire companies, band, and other voluntary organizations.** Where a town organized a fire department, allowing them a room which was furnished partly by an appropriation, partly by voluntary gift, and partly by money furnished by the fire company, ten years after, the fire company disbanded and divided the furniture among its members. *Held*, that the town could maintain replevin for this property.⁵ Members of a new fire company may maintain replevin for such property against members of a former fire company.⁶ Where members of a band divided into two factions, and one sought

¹ *Meldrum v. Snow*, 9 Pick. (Mass.) 441; *Rogers v. Whitehouse*, 71 Me. 350.

² *National Bank v. Dearborn*, 115 Mass. 219; *National Bank v. Bayley*, 115 Mass. 228. See *Trixworth v. Moore*, 9 Pick. 347; *Fettyplace v. Dutch*, 13 Pick. 388; *Whipple v. Thayer*, 16 Pick. 25; *Gibson v. Stevens*, 8 How. 384; *National Bank v. Crocker*, 111 Mass. 163.

³ *Pratt v. Parkman*, 24 Pick. 42.

⁴ *National Bank v. Crocker*, 111 Mass. 163.

⁵ *Inhabitants of Brooklyn v. Sherman*, 140 Mass. (1 N. E. 153); See *Perry v. Stone*, 111 Mass. 60, where under very similar circumstances an action was brought by the firemen who stayed in versus the vendee of those who went out, and the holding in favor of plaintiffs.

⁶ *Bisbee v. Fadden*, 140 Mass. 6 (1 N. E. 742).

to replevin from the other the instruments, *held*, that they were tenants in common, it being a voluntary organization, and replevin would not lie.¹

§ 115. **Certain special interests held not sufficient to maintain replevin.—Illustrations.** Where goods are in the hands of a factor who has a lien for advances, the owner of the goods does not have sufficient possession to maintain replevin.²

§ 116. **Neither does a landlord's lien for rent, or an attachment for it, give him the right to the possession of the crop, and such title will not support replevin for the crop,**³ unless by the terms of the contract he is entitled to possession.⁴

§ 117. **One tenant in common cannot maintain against his co-tenant, and where suit is brought the court will order a return.**⁵

§ 118. **Statute of frauds—Title based on, insufficient.** A title based upon an agreement within the statute of frauds, for not being in writing, but which has been executed, will support replevin.⁶

§ 119. **Title by gift insufficient.** A agrees in writing to give a cow to B, *held*, that until the gift was perfected by delivery, A had such a title that he could maintain replevin against C for possession.⁷

§ 120. **Title based upon promise by infant insufficient.** A title based upon an agreement by an infant to convey

¹ Hewett v. Hatch, 57 Vt. 16.

² Wood v. Orser, 25 N. Y. 348.

³ Bell v. Matheny, 36 Ark. 572; Knox v. Hellums, 38 Ark. 413.

⁴ Sheble v. Curdt, 56 Mo. 437.

⁵ Witham v. Witham, 57 Me. 447; Strickland v. Parker, 54 Me. 322; Wells v. Noyes, 12 Pick. 324. See Chapter on Joint Owners.

⁶ Norton v. Simonds, 124 Mass. 19.

⁷ Miller v. Le Piere, 136 Mass. 20. In this case, A run a raffle and decided that B had won the cow at the raffle, but C claimed to have won her and took possession, and refused to surrender her. The rules of the raffle are not recognized in law, but the transaction in this case is treated as a gift.

to plaintiff will not support an action of replevin by plaintiff.¹

§ 121. **A lien without the right of possession will not support replevin.** One who has advanced money upon an understanding that the proceeds of goods remaining in the possession of the owner shall be applied to repay him, has not such a right to possession of the goods as will support an action for the delivery of them.²

§ 122. **Right to cut trees will not support replevin** for trees cut by another. The owner of a tract of land gave to plaintiff a permit to cut and take away certain trees, reserving the ownership and control of the lumber cut, until payment therefor had been made; defendant, without license, entered upon the land, and cut and removed these trees, *held*, that the plaintiff had no such title or right of possession in the lumber as would entitle him to maintain replevin therefor.³

§ 123. **Title based on pretended but illegal judicial sale will not.** Where an officer pretended to levy two different executions against different defendants upon the same goods, and sell them at the same time to different purchasers, *held*, that the sale made under the writ first levied carried the title, and the purchaser under the second writ did not acquire such title thereby as to sustain replevin against the other purchaser.⁴

§ 124. **Title based on an unexecuted or conditional contract will not support the writ.**⁵ The proper remedy in such cases is to bring an action for the failure to comply with the agreement.⁶ A mere unlawful taking, not followed by

¹ *Pakas v. Racy*, 2 How. Pr. (U. S.) 277.

² *McCurdy v. Brown*, 1 Duer. (N. Y.) 101.

³ *Gillerson v. Mansur*, 45 Me. 25.

⁴ *Knapp v. White*, 40 Wis. 143.

⁵ *Barrett v. Turner*, 2 Neb. 172.

⁶ *Haverstick v. Fergus*, 71 Ill. 105. For examples of such cases see *Whitcomb v. Hungerford*, 42 Barb. 177; *Stevens v. Eno*, 10 Barb. 95; *Lester v. East*, 49 Ind. 588; *Roper v. Lane*, 9 Allen, Mass. 510; *Udike v. Henry*, 14 Ill. 378.

detention will not support replevin as at common law; it will only lie to regain the possession of property *in specie*.¹

§ 125. **One who has placed the title in another is estopped.** Where A and B sell property to different individuals, the purchasers signing a receipt that payments are to be made to C and the title is to remain in C until the last dollar is paid, and then C is to make them a good and sufficient title, *held*, that A and B are estopped to deny that the title to the property is in C, and that they have not such title as will support replevin in their own names for the property.²

§ 126. **Surety on undertaking has not such an interest, for this reason, as will support replevin.** Plaintiff must show such an interest as entitles him to the immediate possession, but the surety on the undertaking of the plaintiff in replevin has no legal interest in the property, and cannot maintain replevin against one wrongfully dispossessing the plaintiff of said property, but one who had given a receipt to produce the property could maintain replevin.³

§ 127. **Title to half interest will not do.** Replevin for timber cannot be maintained on a showing by plaintiff of title to an undivided half of the land from which it was removed.⁴

§ 128. **Proof of title without right to possession not sufficient.** In an action for the unlawful detention of personal property, where the real question litigated is the right of possession, if the plaintiff's evidence shows simply that he was the owner, and that the defendant was rightfully in possession as his bailee, the plaintiff fails to show himself entitled to possession, and a judgment of non-suit on defendant's motion at the close of plaintiff's evidence is proper.⁵

¹ Paul v. Luttrell, 1 Col. 317.

² Rice v. Crow, 6 Heis. (Tenn.) 28.

³ Jimmerson v. Green, 7 Neb. 26.

⁴ Hess v. Griggs, 43 Mich. 397 (5 N. W. 427).

⁵ Gaynor v. Blewitt, 69 Wis. 582 (34 N. W. 725); Everett v. Buchanan, 2 Dak. 249.

The right of recovery depends upon the question who has the right of possession.¹

§ 129. **A right based upon a special law must comply with the terms of the law strictly.** A person who takes up a stray animal and fails to advertise it, as required by law, cannot maintain replevin for it against the owner who has taken it from his possession. Replevin cannot be maintained by one who has only a naked possession without any general or special property in the article in suit.²

§ 130. **To the right of property plaintiff must add the right of possession.** To maintain replevin, the plaintiff must have in himself the right of property, general or special, coupled with the right of immediate possession, and if his title is denied, the *onus* is on him to prove it.³

§ 131. **While possession is *prima facie* title,** it is not in fact ownership, and will not support replevin when the title is shown to be in another.⁴

¹ Parlemon v. Young, 2 Dak. 175.

² Wright v. Richmond, 21 Mo. App. 76; Broadwater v. Darne, 10 Mo. 277; McMahonill v. Walker, 22 Mo. App. 170.

³ Andrews v. Costican, 30 Mo. App. 29; Melton v. McDonald, 2 Mo. 45; Suggett v. Cason, 26 Mo. 221; Gartside v. Nixon, 43 Mo. 138.

⁴ Baker v. Campbell, 32 Mo. App. 529.

CHAPTER VII.

WHO MAY MAINTAIN REPLEVIN.

	Section.		Section.
General rule	132	plevy personal property of his intestate, but not special legacies	151
Either a general or special property is sufficient	133	A pledgee has the right to possession	152
Right to actual possession sufficient	134	If an agent have only constructive possession, his wrongful transfer conveys no right or title	153
Replevin may be maintained by one from whose possession it was taken without right	135	A married woman may maintain replevin without alleging coverture	154
The same	136	A wife may replevy her own property from her husband	155
Who may maintain replevin—Examples	137	Husband cannot replevy from a wife he has abandoned	156
Creditors of a common debtor	138	Where property is wrongfully taken from a lienholder, he may re-take it by replevin	157
One of several defendants in an execution	139	A laborer's lien is protected—general owner cannot replevy	158
State or United States may	140	Liens generally—Illustrations	159
An agent may bring replevin in his own name	141	Effect of tender of amount of lien	160
Right to use property at will is sufficient	142	But where a trespasser places the property in the possession of the lienholder the true owner may replevy	161
General property and right to possession sufficient	143	Owner may replevy as against a stranger notwithstanding the lien	162
One entitled to possession for a special purpose	144	A finder of property has a lien on it for the reward offered	163
One who has lost possession wrongfully	145	Finder may replevy from one taking property from him	164
Who may not maintain replevin—Examples—A surety on a stay bond	146		
One who has pointed out property as that of another is estopped to replevy it	147		
A stranger cannot	148		
Contract against good morals	149		
A servant	150		
An administrator may re-			

	Section.		Section
Finder—Riparian owner—Replevin for involuntary deposit—Not an accretion	165	another officer or from a receptor or from the owner	168
A receptor of property has a greater interest than a naked bailee	166	"Other than the defendant" defined. The trustee and the individual are <i>quoad</i> the property different persons	169
The same	167	"Stranger" defined	170
An officer may replevy from			

§ 132. It is a general rule in replevin that the plaintiff must have a general or special interest in the property he seeks to seize by replevin, and a right to the immediate and exclusive possession of the property. This has been the rule from the earliest time down to the present.¹ To maintain an action for the recovery of specific personal property the plaintiff must have the legal title, and a right to the immediate possession of the entire chattel sued for.² A party who sues in replevin or detinue must have the right of immediate possession, either by virtue of a general property, as owner, or a special property, as bailee, at the time he sues.³ In some states it has been held that an action of replevin

¹ Kirby v. Miller, 4 Cold. (Tenn.) 3; Barrett v. Scrimshaw, Combe, 477; Smith v. Plomer, 15 East. 607; Gordon v. Harper, 7 Duruf. & East. 9 and 6; Britton Nichols Trans. Vol. 1, p. 139; Wade v. Mason, 12 Gray, 335; Pattison v. Adams, 7 Hill, N. Y. 126; Barry v. O'Brien, 103 Mass. 521; Ingersoll v. Emmerson, 1 Carter (Ind.), 77; Bradley v. Michael, 1 Carter (Ind.), 552; Johnson v. Neale, 6 Allen, 228; Meredith v. Knott, 34 Ga. 222; Crocker v. Mann, 3 Mo. 473; Russell v. Minor, 22 Wend. 659; McIsaacs v. Hobbs, 8 Dana (Ky.), 268; Hubloun's Case, Skinner, 65; Forth v. Pursley, 82 Ill. 152; Fairbanks v. Phelps, 22 Pick. 538; Lloyd v. Goodwin, 12 S. & M. (Miss.) 223; Packard v. Getman, 4 Wend. 613; Waterman v. Robinson, 5 Mass. 304; Halibake v. Fish, 8 Wend. 547; Reese v. Harris, 27 Ala. 306; Loveday v. Mitchell, Comyns, 247; Hilger v. Edwards, 5 Nev. 84; Muggridge v. Eveleth, 9 Met. 235; Jimmerson v. Green, 7 Neb. 26.

² Graham v. Myers, 74 Ala. 432; Smith v. Rice, 56 Ala. 418; Soger v. Blain, 5 Hand. (N. Y.) 449; Bassett v. Armstrong, 6 Mich. 397.

³ Buck v. Payne, 52 Miss. 271; Cassell v. Western Stage Co., 12 Iowa, 48; Lowry v. Hall, 2 W. & S. (Pa.) 133; Stapleford v. White, 1 Houst. (Del.) 238; Lester v. McDowell, 18 Pa. St. 91; Pierce v. Stevens, 30 Me. 184; Haythorn v. Rushforth, 4 Har. (19 N. J.) 160; Leibert v. McHenry, 6 Watts (Pa.), 302.

could be maintained in case of an unlawful detention, though the original taking was not tortious and unlawful.¹ "Notwithstanding some dicta to the contrary," says Mr. Justice Hand, in *Brockway vs. Burnap*, 16 Barb. (N. Y.) 309, "replevin would always lie for goods unlawfully taken." As a general rule, replevin lies only in behalf of one entitled to the possession against one having, at the commencement of the suit, actual or constructive possession and control of the property. To this rule there are some exceptions, as where goods wrongfully taken had been in defendant's possession, though disposed of or consumed before suit. The action will never lie where defendant *never has been* in either the actual or constructive possession.²

§ 133. **Either a general or special property is sufficient.** It is an elementary principle that a general or special property in the goods taken is sufficient to maintain replevin.³ One acting as a general agent under a power of attorney and having possession of the goods secured to his principal by mortgage may bring replevin in his own name against one interfering with his possession.⁴ An auctioneer who is the agent of the owner, to whom goods have been sent for sale, may maintain replevin therefor.⁵ The rightful possession proves and constitutes a sufficient right of property, to sustain trover or replevin against one interfering with such possession wrongfully.⁶ So a person in possession as bailee,

¹ *Badger v. Pinney*, 15 Mass. 360; *Baker v. Fales*, 16 Id. 147; *Morton v. Baldwin*, 17 Id. 606; *Seaver v. Dingley*, 4 Green, 306; *Sawtelle v. Rollins*, 23 Me. 196; *Ely v. Ehle*, 3 Comst. (N. Y.) 506; *Dame v. Dame*, 43 N. H. 37; *Kerley v. Hume*, 3 T. B. Mon. 181; *Wright v. Armstrong*, Breese (Ill.), 130; *Harwood v. Smethurst*, 29 N. J. L. 195.

² *Timp v. Dockham*, 32 Wis. 146.

³ 1 Ch. Pl. 163.

⁴ *Bartels v. Arms*, 3 Col. 72.

⁵ *Tyler v. Freeman*, 3 Cush. 261.

⁶ *White v. Bascom*, 28 Vt. 271; *Van Baalen v. Dean*, 27 Mich. 104; *Bass v. Pierce*, 16 Barb. 595; *Armory v. Delamirie*, 1 Smith's L. C. 596; In note to this case is an extended review of the English cases: *Hunt v. Chambers*, 1 Zab. (21 N. J.) 620; *Cleaves v. Herbert*, 61 Ill. 127; *Johnson v. Carnley*, 6 Selden (N. Y.), 570; *Sprague v. Clark*, 41 Vt. 6.

whether as a common carrier, pledgee, or other bailee, may maintain the action as against all persons except the true owner.¹ And even as against the owner, if he has a lien for advances, services, and the like upon it.² So the assignee of a bill of lading, shipping receipt, or warehouse receipt, is the legal owner of the property embraced in it, and may maintain replevin for the same.³ One of the joint owners entitled to possession may replevy against a stranger having no better title.⁴

§ 134. **Right to actual possession sufficient.** The right of possession merely is sufficient to enable a party to maintain replevin. In a contract between vendor and vendee to the effect that the right of property should remain in the vendor, with the right to take possession at any time until the vendee should have fully complied with the terms of sale, *held*, that the vendor could maintain replevin.⁵ To support an action of claim and delivery, the property must be a personal chattel at the time of the taking, and not something which has been turned into a chattel by reason of having been separated from the freehold by the defendant.⁶ To maintain the action of detinue it must be shown that the defendant, at the time the writ was sued out, had the actual possession, or the controlling power over the property where the sheriff had taken the property under a writ, but been ordered to return it to defendant; this was sufficient possession in defendant.⁷ The right is not limited to the general owner; he who has the right of possession may maintain it.⁸

§ 135. **Replevin may be maintained by one from whose**

¹ *Simpson v. Wrenn*, 50 Ill. 222; *Hopper v. Miller*, 76 N. C. 402; *Allen v. Smith*, 45 Ga. 84.

² *Wood v. Orser*, 25 N. Y. 348; *Currier v. Ford*, 26 Ill. 489.

³ *National Bank v. Crocker*, 111 Mass. 163; *National Bank v. Dearborn*, 115 Mass. 219 (15 Am. Rep. 92); *Peters v. Elliott*, 78 Ill. 321.

⁴ *Chaffee v. Harrington* (Vt.), 15 A. 350.

⁵ *Gregory v. Morris*, 1 Wyo. 213.

⁶ *Hull v. Hull*, 1 Idaho, 361.

⁷ *Henderson v. Felts*, 58 Ala. 590; *McArthur v. Currie*, 32 Ala. 75.

⁸ *Williams v. West*, 2 Ohio St. 82.

possession it was taken without right.¹ One who has a present right of possession may bring replevin; possession is *prima facie* lawful. A plaintiff cannot change his case on rebuttal and make a new and different case from his petition.² But the action cannot be sustained by one who has not at the time a general or special property in the goods with the right to their immediate possession.³ It is well established that one having the right to the exclusive possession at the commencement of the suit can maintain replevin even against the general owner⁴.

§ 136. **The same.** Where the plaintiff is able to show that the defendant was taking away property of which he had just before been in possession, claiming to own it, it is sufficient, at least, to put the defendant upon proof of his title or right to possession, and in the absence of such proof the plaintiff will be entitled to recover.⁵ There is a presumption of ownership that follows actual possession of personal property, and is good title against all persons not having a better title.⁶ Possession is a right of property against all the world but the owner.⁷ Replevin lies for him who has

¹ Kellogg v. Adams, 51 Wis. 138 (8 N. W. 115); Hunt v. Chambers, 1 Zab. (21 N. J.) 624.

² Woolston v. Smead, 42 Mich. 54 (3 N. W. 251.)

³ Miller v. Adsit, 16 Wend. 335; Perley v. Foster, 9 Mass. 114; Dunham v. Wyckoff, 3 Wend. 281; Redmon v. Hendricks, 1 Sandf. (N. Y.) 32; Thompson v. Button, 14 Johns. 84.

⁴ Crocker v. Mann, 3 Mo. 473; Prater v. Frazer, 6 Eng. (Ark.) 249.

⁵ Morris v. Danielson, 3 Hill, 168.

⁶ Bogard v. Jones, 9 Hump. (Tenn.) 738; Sawtelle v. Rollins, 23 Me., 196; Morris v. Danielson, 3 Hill, 168; Ingersoll v. Emmerson, 1 Carter, 76; Schermerhorn v. Van Volkenburgh, 11 Johns. 529; Wheeler v. McFarland, 10 Wend. 322; Cusson v. Stout, 17 Johns. 116; Pangburn v. Patridge, 7 Johns. 140; Demick v. Chapman, 11 Johns. 132; Cook v. Howard, 13 Johns. 276; Davis v. Loftin, 6 Texas, 495; Johnson v. Carnley, 10 N. Y. (Seld.) 579; Moorman v. Quick, 20 Ind. 68; Miller v. Jones' Admr., 26 Ala. 260; Shomo v. Caldwell, 21 Ala. 448; Bayliss v. Lefaiivre, 37 Mo. 119; Duncan v. Spear, 11 Wend. 54.

⁷ Armory v. Delamire, 1 Str. 505; Summons v. Austin, 36 Mo. 308; Van Namee v. Bradley, 69 Ill. 301; Freshwater v. Nichols, 7 Jones (N. C.), 252; Morris v. Danielson, 3 Hill, 168; Smith v. Graves, 25 Ark. 461.

the general or special property in goods, against him who has wrongfully taken them¹

§ 137. **Who may maintain replevin—Examples.** The party against whom a writ of execution or attachment runs is the only party who may not maintain replevin against the officer holding the property by virtue of such process.² A *trustee* may maintain replevin for possession of the trust property, but the beneficiaries in the trust cannot.³ A *lessee* of personal property, and not the lessor, may replevy it during the life of the lease. The action of replevin is possessory, and no one not entitled to the possession can maintain it.⁴ A *school district* may bring replevin for its house and other property.⁵

§ 138. **Creditors of a common debtor** may join in a replevin suit for the property of the debtor on which they claim a lien.⁶

§ 139. **One of several defendants in an execution** may (where the statute permits it) replevy property levied on, although his co-defendants do not unite with him in executing the forthcoming bond.⁷

§ 140. **State or United States** may replevy the property of the sovereignty.⁸

§ 141. **An agent may bring replevin in his own name** for bonds bought in his own name, but for his principal.⁹ Where a party conveyed property to a trustee to secure a debt due plaintiff, the action should be in the name of the

¹ Tracey v. Warren, 104 Mass. 376.

² Gross v. Bogard, 18 Kan. 288.

³ Gates v. Bennett, 33 Ark. 475.

⁴ Hunt v. Strew, 33 Mich. 85. See Putnam v. Wyley, 8 T. R. 434; Bruce v. Westervelt, 2 E. D. Smith, 446.

⁵ Joint School District v. Kemen, 65 Wis. 282 (27 N. W. 31).

⁶ Earle v. Burch, 21 Neb. 702 (23 N. W. 254).

⁷ Sheppard v. Melloy, 12 Ala. 561.

⁸ Bly v. U. S., 4 Dill. 464; Johnson v. McIntosh, 8 Wheat. 574; U. S. v. Cook, 19 Wall. 593; Schulenberg v. Harriman, 21 Wallace, 44, Id. 22 Dill. 398.

⁹ Douglas v. Wolf, 6 Kan. 88; Mechem on Agency, 1041.

trustee, and not in name of the beneficiary.¹ Execution was levied on an express package of money sent by the judgment debtor to an agent of his firm to repay advances made by the agent in the interest of his principal. The agent brought replevin against the sheriff, *held*, (1) that as between these parties the question of defendant's right to seize the money in the hands of the express company was immaterial; (2) that if the money was meant as payment, plaintiff could recover, but if to be used in the principal's business, he could not.²

§ 142. **Right to use property at will is sufficient to support replevin.** One who has a right to use property at will can replevy it from any wrongdoer.³

§ 143. **General property and right to possession sufficient.** Replevin lies by a person not having the actual possession of the goods when taken, provided he have at the time the general property and the right of immediate possession.⁴ Replevin will lie by one claiming to be the owner against one who claims to be owner or to have a special ownership in the property.⁵

§ 144. **One entitled to possession for a special purpose may bring replevin.** Thus, where one purchased 500 head of cattle to be by him selected out of a herd, the court say if the seller refused to let him make the selection he could replevy the whole herd, being entitled to the posses-

¹ *Garrett v. Carlton*, (Miss.) 3 So. 376. See *Davis v. Scott*, 22 Neb. 154 (34 N. W. 353.)

² *Nicholson v. Dyer*, 45 Mich. 610 (8 N. W. 515).

³ *Tandler v. Saunders*, 56 Mich. 142 (22 N. W. 271). In this case plaintiff bought property from the husband to be delivered to him in six months, but in the meantime he was to have the use of it whenever he wanted it; it was levied on on a writ against the vendor's wife, and plaintiff, the vendee, brought replevin.

⁴ *Chinn v. Russell*, 2 Blackf. (Ind.) 172; *Dunham v. Wykoff*, 3 Wend. (N. Y.) 280; *Ross v. Cassidy*, 37 How. Pr. (N. Y.) 416; *Davis v. Loftin*, 6 Texas, 496; *Scott v. Elliott*, Phill. [N. C. L. 104].

⁵ *Birks v. French*, 21 Kan. 238.

sion for the purpose of making the selection of the 500 bought and paid for.¹

§ 145. **One who has lost possession wrongfully.** Where property in one's peaceable possession subject to the claims of persons other than the defendant, who seizes it as a mere trespasser, he may maintain replevin for such property.²

§ 146. **Who may not maintain replevin.—Examples.** *A surety on a stay bond* cannot bring replevin for his unexempt property levied on to collect the judgment which he stayed where the officer can find no property of the stayor.³

§ 147. **One who has pointed out property as that of another is estopped to replevy it.** Where a constable has an execution against M., and J. points out a wagon and says it is the property of M., and that the title is as clear as a whistle, and the property is levied on as the property of M., J. is estopped to maintain replevin against the officer to enforce a lien or otherwise.⁴ Where the defendant was the owner of a piano which was left with a third party, who caused it and another one like it to be boxed for shipment, the officer asked this bailee to point out the one belonging to the defendant in the execution. She induced him to levy on the one belonging to herself, and shipped the other off and brought replevin for her own, *held*, that she was estopped to assert title to it now.⁵

§ 148. **A stranger having no interest in the property cannot maintain replevin against a sheriff.**⁶

§ 149. **Contract against good morals.** One who has parted with his property under a contract which is against good morals, and void as against public policy, cannot main-

¹ *McLaughlin v. Piatt*, 27 Cal. 452. See *Wilson v. Royston*, 2 Ark. 315; *Rucker v. Donovan*, 13 Kan. 251; *Williams v. West*, 2 Ohio St. 85; *Garrett v. Carlton* (Miss.), 3 So. 376.

² *Van Baalen v. Dean*, 27 Mich. 104.

³ *McGlothlin v. Madden*, 16 Kan. 466.

⁴ *Hardin v. Joice*, 21 Kan. 318; *Bates on Partnership*, 138-9.

⁵ *Colwell v. Brower*, 75 Ill. 522.

⁶ *Wheeler v. Dixon*, 51 Miss. 550.

tain replevin for it. The law will leave the parties in the situation in which they have placed themselves.¹

§ 150. A servant who has the goods of his master which he must surrender on demand cannot sustain the action.² It should be brought by the master.

§ 151. An administrator may replevy personal property of his intestate, but not special legacies. An administrator may bring claim and delivery for personal property fraudulently transferred by his intestate.³ An administrator of a decedent may maintain replevin for the personal property of the intestate,⁴ but cannot maintain replevin against a legatee for a specific bequest.⁵ An administrator may bring replevin for property alleged to have belonged to his intestate, and, if defeated, judgment should be rendered against him as administrator, and if not performed the sureties on his administrator's bond are liable to the sureties on the replevin bond.⁶

§ 152. A pledgee has the right to possession of the property pledged, and may maintain replevin therefor against one who wrongfully takes or unlawfully detains it.⁷ A pledgee may maintain replevin against one converting the pledge,⁸ but personal property specifically pledged for a particular loan cannot, in the absence of a special agreement, be held by the pledgee for any other advance, and the pledgee (a bank) cannot maintain replevin by virtue of a general lien for monies advanced.⁹

¹ *Hutchins v. Weldin*, 114 Ind. 80 (15 N. E. 804).

² *Mitchell v. Hinman*, 8 Wend. 667; *Brownell v. Manchester*, 1 Pick. 232; *Summons v. Austin*, 36 Mo. 308; *Perley v. Foster*, 9 Mass. 114; *Bond v. Padelford*, 13 Mass. 395; *Stanley v. Gaylord*, 1 Cush. 536; *Harris v. Smith*, 3 S. & R. 23.

³ *Bennett v. Schuster*, 24 Minn. 383.

⁴ *Smith Admr. v. Ferguson*, 90 Ind. 229; *Williams on Executors*, 786.

⁵ *Eberstein v. Camp*, 37 Mich. 176.

⁶ *State to Use, etc., v. Daily*, 7 Mo. App. 548.

⁷ *Darter v. Sellers*, 102 Ind. 458 (1 N. E. 854). See *Estee's Pleadings*, 4190-1.

⁸ *Moore v. Washburn*, 147 Mass. 344 (17 N. E. 884).

⁹ *Duncan v. Brennan*, 83 N. Y. 487. See *Jones on Pledges*, 429.

§ 153. If an agent have only constructive possession, his wrongful transfer conveys no title or right where a consignee brings replevin for property pledged or sold by the consignor on the ground that he exceeded his authority. The defendant who claims under the consignor must show that the consignor had actual possession of the property. Constructive possession is not sufficient, as this should have put the defendant upon inquiry.¹

§ 154. A married woman may maintain replevin without alleging coverture, and, when that fact develops on the trial, may show that the property demanded is her separate property.² A wife may maintain replevin for her own property which has been levied on to pay her husband's debts,³ but she cannot maintain replevin for property which belonged to him because he has absconded,⁴ but she may purchase property from her husband, and, if seized for his debts, bring replevin against the officer.⁵ Where exempt property of a wife has been held by the party from whom purchased because of garnishee proceedings against the husband by a creditor, the wife may maintain an action of replevin before the termination of such proceedings.⁶

§ 155. A wife may replevy her own property from her husband. A wife living separate and apart from her husband, though without good cause, may bring replevin against him for her personal property left in his house and possession.⁷ A wife living apart from her husband can bring re-

¹ Howland v. Woodruff, 60 N. Y. 73. See Bank of Toledo v. Shaw, 61 N. Y. 282.

² Shumway v. Leakey, 67 Cal. 458 (8 Pac. 12); See Black v. Black, 74 Cal. 520 (16 Pac. 311). But if she has allowed her husband to hold himself out as the owner, she is estopped thereby; Bates on partnership, 138-9.

³ Taylor v. Taylor, 12 Lea. (Tenn.) 490.

⁴ Spurgeon v. Spurgeon, 32 Kan. 171. (4 P. 152.)

⁵ Faddis v. Woollomes, 10 Kan. 56. See Furrow v. Chapin, 13 Kan. 107; Dickson v. Randal, 19 Kan. 212; Gong v. Orus, 8 Kan. 85. See Bishop on Married Women, I., § 71; II., § 130.

⁶ Houselman v. Kregel, 60 Mich. 540 (27 N. W. 678).

⁷ Howland v. Howland, 20 Hun. (N. Y.) 472.

plevin against him for her individual property after making demand.¹

§ 156. **Husband cannot replevy from a wife he has abandoned.** A husband who has abandoned his wife cannot maintain replevin against her for household goods.² A husband may maintain replevin against his wife for chattels claimed by her to be her separate property.³ An action of replevin cannot be maintained by a husband against his wife while the marital relation between them is in full force.⁴

§ 157. **Where property is wrongfully taken from the possession of a lienholder, he can retake it by replevin.** A pound master, having a lien for feed, etc., upon stock impounded, where said stock is illegally removed from the pound and returned home, may, after demand, maintain replevin.⁵ So can a hotel or livery stable keeper.⁶ One having a lien for keeping of a horse and for money advanced thereon may enforce that lien by replevin for the horse against the general owner, who had taken possession of the horse without plaintiff's consent and without satisfying the lien.⁷ It lies in favor of a lienholder where the property on which he has the lien has been taken from him against his will.⁸ It will lie in favor of a laborer who had a lien on

¹ *White v. White*, 58 Mich. 546 (25 N. W. 490). Here the property—corn, wheat, and farm machinery—had been originally transferred by the husband to the wife.

² *Smith v. Smith*, 52 Mich. 538 (18 N. W. 347). By statute, the exempt personal property is placed on about the same footing in this state that the homestead is—i. e., it cannot be encumbered without the wife's assent; *Howell's Statutes*, § 7686. And the wife may sue for such property as if it were her separate property; § 6297.

³ *Carney v. Gleissner*, 62 Wis. 493 (22 N. W. 735). In Wisconsin the disabilities of a married woman have been removed by statute, and she may sue and be sued with regard to her own property.

⁴ *Hobbs v. Hobbs*, 70 Me. 383.

⁵ *Trowbridge v. Bosworth*, 45 Conn. 166.

⁶ *Young v. Kimball*, 23 Pa. St. 195.

⁷ *Hartman v. Keown*, 101 Pa. 338. See *Ford v. Ford*, 3 Wis. 399; *Brown v. Smith*, 1 N. H. 36.

⁸ *Young v. Kimball*, 23 Pa. St. 193.

staves for cutting against the owner, who had taken possession of them.¹

§ 158. **A laborer's lien is protected, and general owner cannot replevy.** Where S. furnished money with which B. purchased stock to be by him kept for two years, the profits therefrom to be then equally divided, *held*, that during the two years B. has, as against S. or any purchaser from him, the right to possession.² Replevin will not lie against an officer who has attached logs to enforce a laborer's lien upon them, even in favor of the general owner, and where plaintiff has obtained possession, defendant is entitled to judgment for his special property therein.³ Replevin will not lie in favor of the owner of logs against one who has purchased them at a sale under the foreclosure of a laborer's lien on the same logs.⁴

§ 159. **Liens generally—Illustrations.** An auctioneer or commission merchant advancing money on goods in good faith, but to which his consignee had a fraudulent title, has a lien for his advancements and charges, and may maintain replevin therefor.⁵ Where the owner of a mill had a lien on boards sawed, though removed a short distance from the mill, of which lien the sheriff had knowledge, *held*, that the sheriff was liable to replevin in selling the entire right of owners, and not selling subject to the lien.⁶ Where a cotton factor sold cotton without authority, but upon which he had made advances to the owner, *held*, that the owner could

¹ Mohn v. Stoner, 14 Iowa, 115. See Morse v. Reed, 28 Me. 481; Bayless v. Lefaivre, 37 Mo. 119.

² Cooper v. Brown, 23 Kan. 582.

³ The Union Lumber Co. v. Tronson, 36 Wis. 126; Griffith v. Smith, 22 Wis. 646; Botis v. Hamlin, 22 Wis. 669. The reason of this rule of law is that by the attachment of the laborer this identical property is taken into court to settle the matter of the lien, and not general property as in an ordinary attachment for a general debt.

⁴ Winslow v. Urquhart, 44 Wis. 197; Phillips on Mechanics' Liens, 490.

⁵ Lewis v. Mason, 94 Mo. 551 (5 S. W. 911).

⁶ Wheeler v. McFarland, 10 Wend. (N. Y.) 318.

not maintain replevin against the purchaser, at least without tender of the advances.¹ The workman who repairs a watch or other article has a lien for his charges for repairing.² So has a warehouseman for storage;³ so has an inn-keeper.⁴ Salvors have a lien on property saved from the sea by them, but cannot sell or pledge the property.⁵ But the party claiming the lien must have possession. He cannot bring replevin where he never had possession, to enforce a lien.⁶ As a general rule, when one has possession of goods with a valid lien thereon against the owner, the owner's right of possession as against the lienor is suspended until the lien be legally discharged.⁷ Where a lienholder, as a common carrier, voluntarily surrenders property on which he claims the lien, his lien is waived, and he cannot maintain replevin for the property.⁸

§ 160. But tender of the amount of his lien and costs at any time before the termination of the suit, terminates his right to maintain the suit and ends the action.⁹

§ 161. But where a trespasser places the property in the hands of the lienholder, the true owner may replevin. Thus, where one wrongfully took goods and delivered them to a common carrier, who received them without knowledge of the wrongful taking, it is no defense against an action by the true owner, and the carrier cannot set up a lien for

¹ *Tyus v. Rust*, 34 Ga. 382. See *McCoy v. Cadle*, 4 Iowa, 558; *Corbitt v. Heisey*, 15 Iowa, 297; *Wood v. Orser*, 25 N. Y. 348.

² *Hollingsworth v. Dow*, 19 Pick. 228; *Curtis v. Jones*, 3 Denio, 590; *M'Intyre v. Carver*, 2 W. & S. 392; *Morgan v. Congdon*, 4 Comst. 552.

³ *Platte v. Hebbard*, 7 Cow. 497; *Tyus v. Rust*, 34 Ga. 328.

⁴ *Thompson v. Lacy*, 3 Barn. & Ald. 287; *Turrill v. Crowley*, 13 Ad. & El. 197; *Sunbolf v. Alford*, 3 Mees. & W. 248.

⁵ *Whitwell v. Wells*, 24 Pick. 31.

⁶ *Otis v. Sill*, 8 Barb. (N. Y.) 102.

⁷ *Moore v. Hitchcock*, 4 Wend. 293; *Everett v. Coffin*, 6 Wend. 603; *Bush v. Lyon*, 9 Cow. 52; *Wilbraham v. Snow*, 2 Saund. 47; *McCombie v. Davies*, 7 East. 5; *Jones v. Sinclair*, 2 N. H. 319.

⁸ *L. S. & M. S. R. R. v. Ellsey*, 85 Pa. 283.

⁹ *LeFlore v. Miller*, 64 Miss. 204 (1 So. 99); *Helin v. Gray*, 59 Miss. 54.

carriage against him.¹ But where necessary expense was incurred to preserve the property, or for food to an animal, a different rule would probably apply.²

§ 162. **Owner may replevy as against a stranger, notwithstanding the lien.** A mechanic's lien does not preclude the general owner, from replevying the goods as against a stranger.³ When goods are taken from a carrier by process against him, the owner may sustain an action against the taker, the owner being regarded as in possession, and the carrier as his servant.⁴

§ 163. **A finder of property has a lien on it for the reward offered by the owner for its recovery.** Whether the property be lost or stolen, if the owner offer a reward, and one in good faith finds it and notifies him thereof, he has earned the reward, and is a bailee of the owner to the extent of the reward, and he also has a lien for any necessary expense incurred in preserving the property after finding it.⁵

§ 164. **Finder may replevy from one taking property from him.** The finder of property has an undoubted right to take possession against all the world until the rightful owner appear to claim his property or the authorities interfere to take charge of it, and if the finder is in possession, looking for the owner, and another by fraud or superior force take the property from him, he may bring replevin or trover.⁶ Money picked up on the floor of a shop, in a car, or other public places, belongs to the finder, rather than to the property owner, and replevin will lie by the finder.⁷ There

¹ *Kinsey v. Leggett*, 71 N. Y. 367; *Collman v. Collins*, 2 Hall (N. Y.), 569; *Van Buskirk v. Purington*, 2 Hall (N. Y.), 561; *Robinson v. Baker*, 5 Cush. 137; *Fitch v. Newberry*, 1 Doug. (Mich.) 1.

² *Fitch v. Newberry*, 1 Doug. (Mich.) 1; *Yorke v. Grenaugh*, 2 Lord Raymond, 866.

³ *Bodine v. Simmons*, 38 Mich. 682; *Neff v. Thompson*, 8 Barb. 213.

⁴ *G. W. R. R. Co. v. McComas*, 33 Ill. 186.

⁵ *Cummings v. Gann*, 52 Pa. St. 489.

⁶ *Armory v. Delamire*, 1 Stra. 505.

⁷ *Tatum v. Sharpless*, 6 Phila. 18; *Bridges v. Hawksworth*, 7 E. L.

is an exception to this rule where one lays down his pocket-book in a shop or bank where trading. It is regarded as in the custody of the banker or shop-keeper, and not as lost property.¹ A peculiar case arose in Rhode Island, thus: The plaintiff bought an old safe and left it for sale, with permission to defendant to use it until sold. Defendant in examining it found a package of money in it. The plaintiff demanded the money, which was refused. He then demanded the safe and contents. The safe was at once delivered without the money. Plaintiff brought suit for the money, not claiming it as against the true owner, but claiming that he had a better right to it than the finder. The plaintiff never had had conscious possession of the money, and it was held as against him, the finder had the better right to the money. The place of finding did not change the rights of the parties.² But a finder of a note or check or other evidence of indebtedness has not such a title that he can collect it.³ A peculiar case also arose in Maine, where a plaintiff, while at work, found some hides in a vat where they had lain for fifty years unknown, the tannery having been abandoned and the vat covered up, and the man who had run the tannery, when last operated, had died. *Held*, that the finder could not maintain replevin against the deceased owner's heirs—that the hides were neither lost, abandoned, derelict, nor treasure trove.⁴

§ 165. **Finder—Riparian owner—Replevin for involuntary deposit not an accretion.** An involuntary deposit of a saw log by high water, on the premises of a riparian

& Eq. Rep. 424; *Regina v. West*, 1 Dearsley, C. C. 402; *People v. McGarren*, 17 Wend. 460.

¹ *State v. McCann*, 19 Mo. 249; *McAvoy v. Medina*, 11 Allen, 548; *Lawrence v. The State*, 1 Hump. (Tenn.) 228; *McLaughlin v. Waite*, 9 Cow. 670; *Id.*, 5 Wend. 405.

² *Durfee v. Jones*, 11 R. I. 590.

³ *McLaughlin v. Waite*, 5 Wend. 405; *Id.*, 9 Cow. 670; *Killian v. Carrol*, 13 Ired. (N. C.) 431.

⁴ *Livermore v. White*, 74 Me. 452.

owner, does not constitute him a special bailee thereof for the owner, nor invest him with a right to its possession superior to that of a *former finder*, who had set it adrift, pursued it, and removed it, without such proprietor's consent. The riparian proprietor cannot, in such cases, maintain replevin against such finder for the log.¹ The finder of property can hold it against everybody but the true owner.²

§ 166. **A receiptor of property has a greater interest than a naked bailee.** A receiptor of property attached, who, by his receipt, has bound himself to return the property to the officer upon request, or pay damages, is not a mere naked bailee of the goods, but has a special property in them, even against the original owner, and can maintain replevin against a person unlawfully detaining them from him.³ A receiptor of property may deliver over the property to the officer and then replevy it as his own.⁴ But one in possession as receiptor can not maintain replevin as owner.⁵ But a different rule has been followed in Massachusetts, where it has been held that a receiptor to an officer, or any other bailee, for safe keeping only, has not sufficient interest to maintain replevin.⁶

§ 167. **The same.** In New York the possession of the receiptor is the possession of the officer.⁷ Where goods were attached by the sheriff, and left in the hands of the

¹ Deaderick v. Oulds, 2 Pick. (86 Tenn.) 14 (5 S. W. 487).

² Hamaker v. Blanchard, 90 Pa. St. 377 (35 A. M. R. 664); Bridges v. Hawksworth, 7 Eng. L. & Eq. 424; 2 Wait's A. & D. 234; 6 Wait's A. & D. 153-4; Smith's Leading Case, 7th Ed., 648; Durfee v. Jones (23 Am. Rep. 528), 11 R. I. 588; Tancil v. Seaton, 28 Gratt. (Va.) 601 (26 Am. R. 380).

³ Peters v. Stewart, 45 Conn. 103. See Mitchell v. Hinman, 8 Wend. 667; Phillips v. Hall, 8 Wend. 610.

⁴ Edmunds v. Hill, 133 Mass. 445.

⁵ Cox v. Currier, 62 Iowa, 551 (17 N. W. 767).

⁶ Warren v. Leland, 9 Mass. 265; Perley v. Foster, 9 Mass. 112; Waterman v. Robinson, 5 Mass. 303; Simpson v. McFarland, 18 Pick. (Mass.) 427.

⁷ Mitchell v. Hinman, 8 Wend. 667; Phillips v. Hall, 8 Wend. 610; Butts v. Collins, 13 Wend. 139.

debtor, who gave a receipt, and they were afterwards attached by another creditor, the attachment by the second officer was no trespass on the rights of the debtor, and gave him no right to maintain replevin in his own name; the contest was between the two officers.¹

§ 168. **An officer may replevin from another officer or from a receiptor, or from the owner.** Where an officer attempts to levy on goods on which another officer has already levied, the one with the first levy may maintain replevin without demand.² An officer may bring replevin against a receiptor who refuses to deliver goods intrusted to him by the officer.³ An officer who has actually levied has such a lien that he may bring replevin against any one interfering with his possession, even the owner.⁴ An officer may bring replevin to recover property upon which he has levied an execution or other writ.⁵

§ 169. **"Other than the defendant" defined**—The trustee and the individual are quod the property different persons. A trustee can maintain replevin against an officer who has attached the trust property in a suit against the trustee as an individual. In his trust capacity he is a person "other than the defendant" in the original suit, within the true intent and spirit of the statute.⁶

§ 170. **Stranger defined.** The word *stranger* in Alabama,⁷ which authorizes a replevin by the defendant, or

¹ Brown v. Crockett, 22 Me. 540.

² Pugh v. Calloway, 10 Ohio St. 488.

³ Dezell v. Odell, 3 Hill (N. Y.), 215.

⁴ Martin v. Watson, 8 Wis. 315; Mulheisen v. Lane, 82 Ill. 117; Walpole v. Smith, 4 Blackf. (Ind.) 304; Rhoads v. Woods, 41 Barb. 471; Dayton v. Fry, 29 Ill. 529; Dezell v. Odell, 3 Hill, 215; Morris v. Van Voast, 19 Wend. 283; Clark v. Norton, 6 Minn. 412; Whitney v. Burnette, 3 Wis. 625; Dunkin v. McKee, 23 Ind. 447; Lockwood v. Bull, 1 Cow. 333; Ladd v. North, 2 Mass. 516; Pomeroy v. Trimper, 8 Allen, 399; Fitch v. Dunn, 3 Blackf. Ind. 142.

⁵ Joyner v. Miller, 55 Miss. 208.

⁶ Jackson v. Hubbard, 36 Conn. 10.

⁷ Code, § 2536.

in his absence by a stranger, of goods taken in attachment, means a person not a party to the suit, acting for the defendant's benefit; and on demand made by the defendant this "stranger" must deliver the goods to him or to the sheriff.¹

¹ Kirk v. Morris, 40 Ala. 225.

CHAPTER VIII.

MORTGAGOR AND MORTGAGEE.

	Section.		Section.
History Mosaic law	171	Rule of damages in cases between mortgagor and mortgagee	185
As a general rule	172	Assignee of note can maintain replevin in his own name, though mortgage is not assigned	186
After condition broken, mortgagee may demand possession and replevy at any time	173	Action may be brought in name of mortgagee, though not the real party in interest	187
Mortgagee must always make demand	174	Mortgagee may bring replevin even after he has sold	188
May bring against widow of mortgagor	175	Mortgagee may replevy from a stranger after condition broken or after he has had possession	189
There must be a breach before mortgagee can replevy. — Effect of breach after suit commenced	176	Right to follow to foreign state and replevy	190
Mortgagee cannot replevy on a partial breach	177	Mortgagee may replevy from any one interfering with his right under the mortgage	191
An assignee of the mortgagor is not an agent of the mortgagee, and cannot replevy on that ground	178	But it must be an actual interference, not a threat to interfere	192
Mortgagor can not replevy from mortgagee who has taken possession after condition broken	179	When mortgagee may replevy from officer levying on mortgaged property for debt of mortgagor	193
The contrary has been held	180	The same	194
Where the mortgagor claims damage for a breach of conditions of sale, he may replevy.	181	The same— Proper judgment in such a case	195
Illegality of the consideration of the mortgage no ground for	182	That mortgagee has been summoned as a garnishee of the mortgagor no ground of	196
Part payment no defense to replevin by mortgagee	183	Where officer levies before mortgagee takes possession	197
Distinction between a mortgage and a pledge	184		

	Section.		Section.
Where no default has been made	198	planted and on one to be planted	203
An agreement to mortgage no ground for replevin	199	Where property commingled can only get the property described in mortgage	204
Mortgage given under duress —Void mortgage	200	Where mortgagor wrongfully mixes goods, the mortgagee may replevy the whole	205
Mortgagee must discharge lien for keeping stock first . . .	201	Mortgage alone not sufficient proof of title	206
Right of replevin between different mortgagees	202		
Distinction between a mortgage given on a crop			

§ 171. **History Mosaic law.** The mortgaging or pledging of property to secure the payment of a debt or the performing of an agreement has been known from a very early day. It was provided in the civil legislation of Moses that, if a man held his neighbor's raiment in *pledge* for debt, he must deliver it to the debtor by sunset, that it might be used as night covering—Exodus XXII., 26, 27—and that “no man shall take the nether or the upper millstone to “*pledge*,” Deut. xxiv. 6. At the present time, its chief use is to secure the payment of a sum of money.

§ 172. **As a general rule,** the mortgagee of personal property cannot maintain replevin against the mortgagor after default or condition broken without demand for the possession. But after default of any of the conditions of the mortgage he may make demand, and, on refusal to deliver, may bring replevin and sustain his right to possession on the mortgage alone. A mortgagee of personal property cannot maintain an action to recover the possession of the same from a third person when the mortgage provides that the mortgagor shall retain possession of the property mortgaged. Right of possession is necessary as a basis for action.¹ But where by statute on default the legal right to possession is in the mortgagee, he may maintain replevin if the mortgage

¹ Laubenheimer v. McDermott, 5 Mont. 512 (6 Pac. 344.); Belden v. Laing, 8 Mich. 500; Clark v. West, 23 Mich. 242.

be silent on the subject of possession.¹ Where in a mortgage of personal property there is an agreement that the mortgagor shall retain possession for a definite time, the mortgagee cannot maintain replevin until the expiration of that time, but if, at the time of trial, the plaintiff have a right to the property, the defendant cannot have judgment for a return.² Where it is agreed at the time of taking a mortgage of a chattel that the mortgagor should retain possession, the mortgagee cannot maintain replevin against one who takes the chattel.³ And many authorities hold that any default vests the legal title at once in the mortgagee absolutely.⁴ The mortgagee of personal property (where it is stipulated in the mortgage that he may take possession upon condition broken) has such an interest in the mortgaged property that he may, after condition broken, maintain an action of replevin for the mortgaged property. It is not necessary that plaintiff be the absolute owner. A special interest or ownership is sufficient.⁵

§ 173. **After condition broken, mortgagee may demand possession and replevy at any time.** A mortgagee of chattels, after condition broken, and demand for possession, may maintain replevin for the possession thereof.⁶ A mortgagee of chattels, who is authorized by the instrument to take possession if at any time he deem himself insecure, may demand the property at any time, and, upon the refusal of the mortgagor to deliver it, may maintain replevin therefor.⁷

¹ *Mervine v. White*, 50 Ala. 388; *Morrison v. Judge*, 14 Ala. 182; *Bell v. Pharr*, 7 Ala. 807.

² *Ingraham v. Martin*, 15 Me. 373.

³ *Pierce v. Stevens*, 30 Me. 184; *Warner v. Matthews*, 18 Ill. 83; *McCoy v. Cadle*, 4 Iowa, 557; *Curd v. Wunder*, 5 Ohio St. 92.

⁴ *Heyland v. Badger*, 35 Cal. 411; *Brookover v. Esterly*, 12 Kan. 149; *Patchin v. Pierce*, 12 Wend. 61; *Brown v. Bement*, 8 Johns. 96; *Ackley v. Finch*, 7 Cow. 290; *Butler v. Miller*, 1 Comst. (N. Y.) 496; *Livor v. Orser*, 5 Duer. 501; *Langdon v. Buel*, 9 Wend. 80; *Saxton v. Williams*, 15 Wis. 292.

⁵ *Brookover v. Esterly*, 12 Kans. 149.

⁶ *Case v. Campbell*, 14 Or. 460 (13 Pac. 324).

⁷ *Gage v. Wayland*, 67 Wis. 566 (31 N.W. 108); *Huebner v. Koebke*,

§ 174. **Mortgagee must always make demand.** A mortgagee cannot maintain replevin for the mortgaged goods, even after default, without demand. If he fail in one action of replevin for want of demand, it does not bar another action after proper demand.¹

§ 175. **May bring against widow of mortgagor.** The mortgagee may bring replevin for the property covered by his mortgage after default against the widow of his deceased mortgagor, even though the property constituted all the property of the estate, and had been set off to her by proper order of the court.²

§ 176. **There must be a breach before mortgagee can replevy. Breach after suit commenced.—Effect.** The law is well settled that, although a trustee or mortgagee of personal property is, after default made, or condition broken, entitled to the possession and is considered in law the owner of the property thus mortgaged, and his right to possession will be upheld in the proper action, yet prior to that time it is equally certain that no such right of either possession or ownership exists.³ The simple fact that the mortgagor commenced his suit a few days before the maturity of the debt and before default does not give the defendant title to the property. The plaintiff should be permitted to show that the debt had matured and default been made since the bringing of the suit, that the rights of the parties may be equitably determined and adjusted.⁴

§ 177. **Mortgagee cannot replevy on a partial breach.** Where the condition in the mortgage was that the mortgagor

42 Wis. 319; *Cline v. Libby*, 46 Wis. 123; *Frisbie v. Langworthy*, 11 Wis. 375.

¹ *Roberts v. Norris*, 67 Ind. 386.

² *Recker v. Kilgore*, 62 Ind. 10.

³ *Barnett v. Timberlake*, 57 Mo. 499; *Sheble v. Curdt*, 56 Mo. 437; *Jackson v. Cunningham*, 28 Mo. App. 354; *Pace v. Pierce*, 49 Mo. 393; *Bowen v. Benson*, 57 Mo. 26; *Laughlin v. Fairbanks*, 8 Mo. 266.

⁴ *Hickman v. Dill*, 32 Mo. App. 509; *Leonard v. Whitney*, 109 Mass. 266; *Boutell v. Warne*, 62 Mo. 350; *Jones v. Evans*, 62 Mo. 382; *Dougherty v. Cooper*, 77 Mo. 528; *Heap v. Jones*, 23 Mo. App. 621.

might hold possession "until the non-payment of said two promissory notes at maturity," *held*, that on default in payment of one note and before maturity of the other, the mortgagee was not entitled to possession, and could not maintain replevin.¹ But where there are several notes, he does not lose his lien, if, upon the non-payment of the first note becoming due, he does not at once foreclose, but he may wait until the last note matures, and then take the property.²

§ 178. **An assignee of the mortgagor is not an agent of the mortgagee and cannot replevy on that ground.** One who purchases and takes possession of personal property subject to mortgages thereon, which he assumes to pay, cannot, in an action of replevin brought in his own name, recover upon the ground that he is the agent of the mortgagees.³

§ 179. **Mortgagor cannot replevy from mortgagee who takes possession after condition broken.** Where the mortgagee of chattels takes possession after condition broken, the mortgagor, who has subsequently tendered the sum due on the mortgage, but has not kept the tender good by paying the money into court, cannot maintain replevin for the property.⁴

§ 180. **The contrary has been held.** But the owner of personal property who executes a chattel mortgage thereon, containing a stipulation that he may retain possession thereof until the maturity of the debt, can, if the mortgagee takes possession of such property before that time, recover its possession in an action of replevin.⁵ A mortgagor may bring replevin against the mortgagee who has seized the property

¹ McGuire v. Benoit, 33 Md. 181.

² Cleaves v. Herbert, 61 Ill. 127. See Reese v. Mitchell, 41 Ill. 365.

³ McNorton v. Akers, 24 Iowa, 369.

⁴ Smith v. Phillips, 47 Wis. 202 (2 N.W. 285). This case does not decide that if tender had been kept good, replevin could have been maintained, but leaves that point undecided.

⁵ Niven v. Burk, 82 Ind. 455. See Merrill v. Denton (Mich.), 41 N.W. 823.

without having brought a personal action for the debt secured thereby, and may show that part of the debt is paid.¹

§ 181. **Where the mortgagor claims damage for a breach of conditions of sale, he may replevy.** Where a mortgagee seizes property upon an alleged default, and the mortgagor replevies and the defendant justifies his possession by the mortgage, plaintiff may allege and show damages upon a breach of such warranty, and such matters may be properly adjusted in a replevin suit.²

§ 182. **Illegality of the consideration of the mortgage no ground for.** Where a mortgagee has obtained possession of personal property for breach of the conditions of the mortgage, the mortgagor cannot maintain replevin of the property upon the ground that the consideration of the mortgage was illegal.³

§ 183. **Part payment no defense to replevin by mortgagee.** It is no defense to an action by a mortgagee that the debt has been partly paid and credit not given. Nothing less than full payment defeats his right to possession after condition broken.⁴

§ 184. **Distinction between a mortgage and pledge.** A mortgage passes the title of the property to the mortgagee, subject to be redeemed according to the terms of the contract, and if not redeemed the property becomes absolute in the mortgagee, and he may sustain replevin for the property or trover for the value, and the mortgagor cannot maintain replevin or trover against the mortgagee for refusing to deliver the goods or for selling them, for the title is at law in the mortgagee and trover depends on title, general or special, to support it, and the mortgagor has no title, only an equitable right to redeem the property by payment of the amount

¹ Gardner v. Matteson, 38 Mich. 200.

² Hutt v. Bruckman, 55 Ill. 441.

³ Dougherty v. Bonavia, 124 Mass. 210.

⁴ Roberts v. White, 146 Mass. 256 (15 N. E. 568).

due on the mortgage. But in case of a pledge, the title is not transferred.¹

§ 185. **Rule of damages in cases between mortgagor and mortgagee.** Where property pledged to secure a debt is sought to be recovered by replevin, and judgment is for defendant for the money value of the property pledged, and is paid, the judgment being for more than the plaintiff's debt, the defendant holds the remainder of the money recovered, after satisfying his claim, to the use of plaintiff.² In such cases, judgment should be rendered for defendant's interest in the property only. This prevents a multiplicity of suits.³

§ 186. **Assignee of note can maintain replevin in his own name for the mortgaged property, though the mortgage is not assigned.** The assignment of the note carries the mortgage with it, notwithstanding that it may not be a legal transfer of the mortgage. The debt and the security are inseparable, and cannot reside at the same time in different parties; and he who controls the debt also controls the mortgage.⁴ I am aware that this is a disputed question, and that Jones says, "The mortgagee's legal interest does not pass by his assignment of the debt. Such assignee cannot maintain replevin in his own name for the mortgaged property, though he may, in the absence of any express or implied stipulation to the contrary, bring such action in the name of the mortgagee, who holds, in such case, the legal title in trust for such assignee's benefit."⁵

¹ Heyland v. Badger, 35 Cal. 409; White v. Phelps, 12 N. H. 385; Ferguson v. Thomas, 26 Me. 499; Dewey v. Bowman, 8 Cal. 150; Tabot v. DeForrest, 3 G. Green, Iowa, 586; Brown v. Bement, 8 Johns. 96; Wood v. Dudley, 8 Vt. 430; Tannahill v. Tuttle, 3 Mich. 110; Holmes v. Bell, 3 Cush. 323; Burdick v. McVanner, 2 Denio, 171.

² Miles v. Walther, 3 Mo. App. 96.

³ Dilworth v. McKelvy, 30 Mo. 149.

⁴ Kingsland v. Chrisman, 28 Mo. App. 308; Christy v. Scott, 31 Mo. App. 331; Woodruff v. King, 47 Wis. 261; Rice v. Cribb, 12 Wis. 182; Crow v. Vance, 4 Iowa, 440; Furbank v. Goodman, 5 N. H. 450.

⁵ Jones, Chattel Mortgages, § 503, citing Rousdall v. Tewksbury, 73

But when we consider the fact that the tendency of both the courts and the legislatures is to insist upon the prosecution of actions in the name of the real party in interest, the doctrine of the *Kingsland* case, *supra*, is certainly the better.¹ The endorsement in blank of a promissory note, which stipulates that a certain chattel therein described shall remain the property of the payee until the note has been paid, does not, of itself, vest the title to such chattel (a sewing machine) in the endorsee so as to enable him to replevy the chattel on demand and non-payment of the note.² The assignee of a chattel mortgage may, upon condition broken, maintain an action of replevin for the recovery of the mortgaged property.³

§ 187. **Action may be brought in name of the mortgagee, though not the real party in interest.** One who takes a chattel mortgage in his own name, but, in fact, for the benefit of another, may maintain replevin for such chattel in his own name, without joining such other person.⁴

§ 188. **Mortgagee may bring replevin even after he has sold.** The trustee (mortgagee), in a deed of trust of personal property to secure a debt, has, after the maturity of the debt, and condition broken, a right to the possession of the property, and this right continues after he has sold the same, for the purpose of enabling him to deliver possession to the purchaser, and he can maintain replevin against the mortgagor, who has in the mean time taken possession of the property again.⁵

§ 189. **Mortgagee may replevy from a stranger after condition broken or after he has had possession.** Replevin

Me. 197, which upholds the text. See *Prout v. Root*, 116 Mass. 410; *Graham v. Rogers*, 21 Ala. 498.

¹ See *City of St. Louis v. Rudolph*, 36 Mo. 465; *Edgell v. Tucker*, 40 Mo. 531; *Crowfoot v. Gurney*, 9 Bing. 372.

² *The Domestic S. M. Co. v. Arthurhultz*, 63 Ind. 322.

³ *Barbour v. White*, 37 Ill. 164.

⁴ *Allen v. Kennedy*, 49 Wis. 549 (5 N. W. 906).

⁵ *Lacy v. Gibony*, 36 Mo. 320; *Pace v. Pierce*, 49 Mo. 393.

lies by the mortgagee of a chattel against one tortiously taking it from the custody of the mortgagor, default in payment having been made by the mortgagor.¹ A mortgagee in possession of fixtures attached to the freehold can, in case of their removal, bring replevin.²

§ 190. **Right to follow to foreign state and replevy.** If the chattel mortgage is properly executed and filed or recorded according to the laws of the country or state where drawn, and the mortgagor, contrary to the provisions thereof, removes the property to another state or foreign jurisdiction and there sells it, the mortgagee may follow and replevy it even from the purchaser. This is upon the theory that the mortgage is an absolute transfer of the title to the mortgagee, and that the mortgagor is but a bailee or an agent with a limited right of possession, and his removal of it from the place in which he was allowed to keep and use it amounts to a theft of the property, or, in its most favorable light, as a sale by a bailee without right, and the purchaser would take no better right than a purchaser from a thief.³ A mortgagee of a vessel under the laws of Nova Scotia may replevy the vessel in Massachusetts.⁴

§ 191. **Mortgagee may replevy from anyone interfering with his rights under the mortgage.** A mortgagee of personal property, not in actual possession, may maintain replevin against a person taking the same in defiance of his right, where the terms of the mortgage entitle him to take possession whenever he deems it necessary.⁵

§ 192. **But it must be on an actual interference, not a**

¹ Fuller v. Acker, 1 Hill (N. Y.), 473.

² Laffin v. Griffith, 35 Barb. (N. Y.) 58.

³ Welch v. Sackett, 12 Wis. 243; Cotton v. Watkins, 6 Wis. 629; Offutt v. Flagg, 10 N. H. 46; Pickard v. Lowe, 15 Me. 48; Blystone v. Burgett, 10 Ind. 28; Smith v. McLean, 24 Iowa, 322; Martin v. Hill, 12 Barb. 633; Loeschman v. Machin, 2 Stark, 311; Jones v. Taylor, 30 Vt. 42; Barker v. Stacy, 25 Miss. 471; Ryan v. Clanton, 3 Strob. (S. C.) 413; Brackett v. Bullard, 12 Met. 309.

⁴ Esson v. Tarbell, 9 Cush. Mass. 407.

⁵ Welch v. Sackett, 12 Wis. 243; Frisbee v. Langworthy, 11 Wis. 375.

threat to interfere. Thus, where an officer levied on mortgaged property, and said he would sell it regardless of the mortgage, it was *held*, that the officer's declaration to sell the absolute estate did not render the taking illegal, so as to sustain an action of replevin.¹

§ 193. **When mortgagee may replevy from officer levying on mortgaged property for debt of mortgagor.** Where by statute the interest of the mortgagor in the mortgaged chattels is subject to levy, replevin cannot be maintained by the mortgagee against an officer who levies on the same on a writ against the mortgagor, as the officer can only sell the mortgagor's interest, but where such interest is regarded as an intangible thing that cannot be reached by direct levy, of course the levy of the officer is upon the whole chattel, and an infringement of the mortgagee's rights, and he may bring replevin against the officer, and the validity of the mortgage is frequently tested in this way.² A mortgagee has such an interest in the mortgaged chattels after condition broken that he can maintain replevin against a sheriff who has taken them on an attachment against the mortgagor.³ A mortgagee of chattels, entitled to take possession of them for any cause, and especially on default of payment as provided by the terms of the mortgage, can usually maintain this action against a sheriff who seizes them by virtue of an execution or attachment against the mortgagor.⁴ Where default is made and the mortgagee demands possession of the mortgaged property, and the officer refuses to surrender it, *held*, that the mortgagee may maintain an action in replevin for the possession thereof without first demanding payment of the mortgage debt from the mortgagor

¹ *Squires v. Smith*, 10 B. Mon. (Ky.) 33. See *Johnson v. Prussing*, 4 Bradw. (Ill.) 575; *Persels v. McConnell*, 16 Bradw. (Ill.) 526.

² *Olds v. Andrews*, 66 Ind. 147.

³ *Willis v. O'Brien*, 35 N. Y. Sup. Ct. 537.

⁴ *Willis v. O'Brien*, 35 N. Y. Sup. Ct. 536; *Frisbee v. Langworth*, 11 Wis. 375.

or the officer.¹ In such a case, it is no defense for the officer to show that, at the time of such demand and refusal, another person held an unsatisfied prior mortgage on the property, by which such other person might have a right of possession as against the mortgagee.²

§ 194. **The same.** A mortgagee may bring replevin against a sheriff for the chattels covered by his mortgage and held by the sheriff under an attachment for creditors.³ The mortgagee of goods attached, while in the possession of the mortgagor, by an invalid attachment, may maintain replevin against the attaching officer.⁴ And where the mortgagee has taken possession of the property and it is levied on for the debt of the mortgagor, there seems to be no question but that the mortgagee may replevin from the officer, and in Kentucky it is so provided by statute.⁵ Under the Maine statute a mortgagee or pledgee of property must give an officer holding the same by process forty-eight hours' notice of the nature and amount of his claim before he can maintain replevin.⁶ Where a mortgagor is in possession of the mortgaged property, under a clause in the mortgage which gives him the right to retain possession until the debt is due, he has an interest which, before the debt is due, can be levied on for his debts; but under the clause which allows the mortgagee to take possession if he feel insecure, the mortgagee, if a levy be made, can take the property from the officer. In such cases the levy has usually been held to create an equitable lien for any surplus over the payment of the mortgage,⁷ and there is no question but where the prop-

¹ Rankin v. Greer, 38 Kan. 343 (16 P 680).

² Rankin v. Greer, 38 Kan. 343 (16 P 680).

³ Lorton v. Fowler, 18 Neb. 224 (24 N. W. 685).

⁴ Allen v. Wright, 134 Mass. 347.

⁵ McIsaacs v. Hobbs, 8 Dana (Ky.), 268.

⁶ Fairfield v. Nye, 60 Me. 373.

⁷ Lininger v. Herron, 18 Neb. 450 (25 N. W. 578); Id. 23 Neb. 197 (36 N. W. 481); Saxton v. Williams, 15 Wis. 292; Cotton v. Watkins, 6 Wis. 629; Mattison v. Bancus, 1 Comst. (N. Y.) 295; Redmond v.

erty is levied on for a debt of the mortgagor while in his hands, and his debt matures before sale, and is not paid, the mortgagee may demand the property and sustain replevin for its possession.¹

§ 195. **The same—Proper judgment in such case.** Where in an action to recover possession of personal property, plaintiff claimed a special interest as mortgagee, defendants being the general owners, with a right to redeem, *held*, that the proper judgment in favor of the plaintiff was for a return of the property or for its value, fixing it at the amount of plaintiff's interest, *i. e.*, the amount due on the mortgage, not for the full value of the property, with damages for the detention.²

§ 196. **That mortgagee has been summoned as a garnishee of the mortgagor no ground of.** A mortgagee of goods, who has been summoned as trustee on a writ against the mortgagor, cannot replevy them from the attaching officer during the continuance of the attachment. His right of possession is not such as will allow him to thus interfere with the possession of the officer.³

§ 197. **Where officer levies before mortgagee takes possession.** A mortgagee of chattels, whose mortgage is past due and unpaid, but not foreclosed, cannot maintain replevin against an officer who has taken the mortgaged chattels on an execution against the mortgagor and is proceeding lawfully to sell the same, and the officer has a right to the possession even against the mortgagee.⁴

Hendricks, 1 Sandf. (N. Y.) 32; Prior v. White, 12 Ill. 261; Schraeder v. Wolfen, 21 Ind. 238.

¹ Simmons v. Jenkins, 76 Ill. 481; Frisby v. Langworthy, 11 Wis. 379; Beach v. Derby, 19 Ill. 622; Eggleston v. Mundy, 4 Gibbs (Mich.) 295; Carty v. Fenstermaker, 14 Ohio St. 457; McIsaacs v. Hobbs, 8 Dana (Ky.) 268; Putnam v. Cushing, 10 Gray (Mass.), 334; Bates v. Wilber, 10 Wis. 415; Randall v. Cook, 17 Wend. 55; Bailey v. Burton, 8 Wend. 339; Newman v. Tymeson, 13 Wis. 172.

² Allen v. Judson, 71 N. Y. 77.

³ Furber v. Dearborn, 107 Mass. 122; Boynton v. Warren, 99 Mass. 172; Martin v. Bagley, 1 Allen, 381; Hayward v. George, 13 Allen, 66.

⁴ Cary v. Hewitt, 26 Mich. 228. This decision was rendered upon the

§ 198. **Where no default has been made.** Where property left in the hands of the mortgagor, under the terms of the mortgage, until default, is levied upon before default, this does not give the mortgagee the right to bring replevin. At least, he would have to make demand before bringing an action.¹ And where the mortgage provides that on such a contingency arising the mortgagee shall have the right to immediate possession, it is usually considered the same as if default had been made in payment.

§ 199. **An agreement to mortgage no ground for replevin.** One having an equitable mortgage (an agreement to mortgage) only, cannot maintain replevin against a sheriff who has levied on the property as the property of the mortgagor.² Where A. agreed to pay his debt to L. out of a field of sixty acres of corn by gathering and delivering it, but the price or number of bushels was not definitely agreed upon, *Held*, that L. did not have such a title or interest that he could maintain replevin against one who levied upon the whole corn for a debt of A.³ But it has been held in such a case that replevin would lie against a receiver. Where C.,

following statute: "When goods or chattels shall be pledged, by way of mortgage or otherwise, for the payment of money, or the performance of any contract or agreement, such goods or chattels may be levied upon and sold on execution against the person making such pledge, subject to the lien of the mortgage or pledge existing thereon; and the purchaser at such sale shall be entitled to pay to the person holding such mortgage or pledge the amount actually due thereon, or otherwise perform the conditions of the pledge at any time before the actual foreclosure of such mortgage or pledge, and, on such payment or performance, or a full tender thereof, shall thereupon acquire all the right, interest, and property of which the defendant in execution would have had in such goods and chattels, if such mortgage or pledge had not been made."—Compiled Laws, § 4461. In the absence of such a statute, this case would hardly be good law. To same effect is *Macomber v. Saxton*, 28 Mich. 516.

¹ *Holladay v. Bartholomae*, 11 Bradw. (Ill.) 206; *Mobley v. Letts*, 61 Ind. 11; *Sparks v. Compton*, 70 Ind. 393; *Louthain v. Miller*, 85 Ind. 161.

² *Empire S. T. F. Co. v. Grant*, 44 Hun. (N. Y.) 434.

³ *Bailey v. Long*, 24 Kan. 90.

to get B. to sign his notes as surety, verbally mortgaged certain property to him, C. then failed and his receiver took possession of the mortgaged property, *held*, that B. could, after the maturity of the notes, replevy the mortgaged property—that it was not necessary that he first pay the notes in this case.¹

§ 200. **Mortgage given under duress, void mortgage.** A person who gave an ordinary chattel mortgage to an officer to secure release from imprisonment may maintain replevin against such officer when he takes the property under the mortgage, and is not estopped to claim that the mortgage is invalid and void.²

§ 201. **Mortgagee must discharge lien for keeping stock first.** It will not lie by mortgagee for cattle until he was paid or tendered the charges of one who has fed and cared for them at request of the mortgagor.³ But where a mortgagor of horses kept them at the stable of an employee who claimed a lien for their care as against the mortgagee, *held*, that the mortgagee could maintain replevin, and that no lien was created as against him.⁴

§ 202. **Right of replevin between different mortgagees.** A mortgagee of personal property, having brought an action of replevin against a second mortgagee who was in possession, the defendant brought into court the money due on the first mortgage, and tendered it to the plaintiff. He did not plead his second mortgage, but relied on his possession and his tender. The plaintiff replied that since the commencement of the suit he had sold the property, under his first mortgage, to a third person. *Held*, (1) That the first mortgagee (plaintiff) was justified in replevying the property; (2) upon the payment or tender of the debt, to secure which the mortgage was given, he was compellable to give up the prop-

¹ Bates v. Wiggins, 37 Kan. 44 (14 P 442). That an oral mortgage is valid see Weil v. Ryus, 39 Kan. 564.

² McCartney v. Wilson, 17 Kan. 294.

³ Browns v. Holmes, 13 Kan. 492. See Russell v. Smith, 14 Kan. 373.

⁴ Howes v. Newcomb, 146 Mass. 76 (15 N. E. 123).

erty; (3) If, before such tender, he had, under the terms of the mortgage, sold the property, he will be excused for refusing the tender and failing to give up the property, but the burden of showing this fact lies upon him.¹

§ 203. **Distinction between a mortgage given on a crop planted and one to be planted.** It is well settled that a mortgage may be made on a growing crop, and that, after the crop matures and is gathered, there is a legal title in the mortgagee, which will support an action for the recovery of the chattel in specie. A crop is regarded as planted when the seed is sown, and thus becomes a part of the freehold. But a mortgage on a crop to be afterwards planted and grown stands in a different category. Such conveyance at most creates only an equitable lien; and, until the sale is perfected by a delivery of the product, no legal title exists in the mortgagee, and he can maintain no action at law for its recovery. In such condition the legal title remains in the mortgagor.²

§ 204. **Where property commingled, can only get the property described in the mortgage.** Parties holding a mortgage upon a stock of drugs which are subsequently removed by the mortgagor with their consent, and commingled with another stock of like drugs, can by replevin only obtain possession of the drugs removed, and not of the combined stock.³

§ 205. **Where mortgagor wrongfully mixes goods, the mortgagee may replevy the whole.** If a mortgagor of goods mixes them, purposely or carelessly, with his own, and sells the whole, the mortgagee can replevy the whole from the purchaser, in the absence of evidence to distinguish the mortgaged goods from those not mortgaged.⁴

¹ Williamson v. Gottschalk, 1 Mo. App. 425.

² Wilkinson v. Ketler, 69 Ala. 435; Booker v. Jones, 55 Ala. 266; Rees v. Coals, 65 Ala. 256; Grant v. Steiner, 65 Ala. 499. See Gillilan v. Kendall (Neb.), 42 N. W. 281.

³ Hubbell v. Allen, 90 Mo. 574 (2 S. W. 434). (See Chap. XVIII.)

⁴ Adams v. Wildes, 107 Mass. 123. (See Chap. XVIII.)

§ 206. **Mortgage alone not sufficient proof of title.** In an action of replevin, the execution and delivery of a mortgage, which is duly recorded, of the replevied property by a third person to the plaintiff, will not establish the plaintiff's right to the property as against the defendant, who is in possession, in the absence of evidence that the plaintiff ever had possession of the property, and that the mortgagor ever had possession of or title to the same.¹ But if there is independent evidence that plaintiff was in possession when he executed the mortgage, the mortgage is admissible as showing an act of dominion over the property, and is some evidence of title.²

¹ *Gibbs v. Childs*, 143 Mass. 103 (9 N. E. 3).

² *Eames v. Snell*, 143 Mass. 165 (9 N. E. 522); *Farwell v. Rogers*, 99 Mass. 33.

CHAPTER IX.

AGENT, BAILOR, AND BAALEE.

	Section.		Section.
A person dealing with an agent or bailee must look to the authority of the agent	207	Where a bailee pledges goods without authority, owner may replevy at once . . .	213
Replevin will not lie by owner because agent sells at less price than he should . . .	208	A pretended sale by drunken bailee no protection to the purchaser	214
Where agent sells without authority, owner may replevy	209	Bailee's interest may be levied on and sold, and bailor cannot replevy	215
Bailee may replevy from a stranger to the title . . .	210	But if the whole thing be levied on, replevin will lie by the real owner	216
Bailee may successfully defend against the owner as well as a stranger—Duty of bailee	211	A bailee of property cannot dispute the title of his bailor	217
Where the terms of the bailment are violated, replevin may be brought at once by the owner	212	The general owner must tender amount of lien . . .	218

§ 207. A person dealing with an agent or bailee must look to the authority of the agent. But that authority he may determine from the acts of the principal. If the principal place his goods in the hands of an auctioneer, it will not be presumed that they were not placed there for sale. Where a man sent a horse to a sale stable and it was sold, but on different terms from those warranted by his private instructions, the sale was held to convey a good title;¹ that is, one dealing with an agent, knowing him to be an agent, is not bound by secret instructions of which he has no knowledge. In the case above, if the ordinary business of

¹ *Sarjeant v. Blunt*, 16 Johns. 74; *Moore v. McKibbin*, 33 Barb. 246; *McMorris v. Simpson*, 21 Wend. 610.

the stable keeper had been other than that of the sale of horses, his sale of the horse would have conveyed no title. A purchaser from an agent must ascertain his authority at his peril. A purchaser from an agent without authority, even though the purchaser pay full value and acts in good faith, carries no title, and the owner may sustain replevin.¹

§ 208. **Sale not invalid because agent sells at less than the price fixed by his principal.** Where an agent or bailee, with authority to sell, sells at a less price than his instructions warrant, the sale is still good, in the absence of fraud, and replevin will not lie by the owner.² If after the sale the agent abscond with the proceeds, it does not avoid the sale; and if the principal should take the sale money with knowledge of the facts, it would be an affirmance of the sale, and action would not lie by him for the property.

§ 209. **Where agent sells without authority, owner may replevin.** Where a man sent goods to an agent for sale on account, and the agent sold them to his own creditor, thus paying his own debt, the title of the owner is not thereby divested, and he may bring replevin against even a subsequent purchaser without notice.³ This rule is based

¹ *Jefferson v. Chase*, 1 Hous. (Del.) 219; *Sargent v. Gill*, 8 N. H. 325; *Lovejoy v. Jones*, 10 Foster, 165; *Sanborn v. Coleman*, 6 N. H. 14; *Fenn v. Harrison*, 3 D. & E. 754; *Johnson v. Willey*, 46 N. H. 75; *East India Co. v. Hensley*, 1 Esp. 112. See *Stanley v. Gaylord*, 1 Cush. 544; *Schemmelpennich v. Bayard*, 1 Pet. 264; *Pribble v. Kent*, 10 Ind. 325; *Johnson v. Willey*, 46 N. H. 76; *Poole v. Adkinson*, 1 Dana, 110; *Roland v. Gundy*, 5 Ohio, 202; *Sargent v. Gill*, 8 N. H. 325; *Galvin v. Bacon*, 2 Fairfield (Me.), 28; *Nash v. Mosher*, 19 Wend. 431; *Howland v. Woodruff*, 60 N. Y. 74; *Neff v. Thompson*, 8 Barb. 213; *Sarjeant v. Blunt*, 16 Johns. 74; *Drummond v. Hopper*, 4 Har. (Del.) 327; *Lecky v. McDermott*, 8 S. & R. (Pa.) 500; *Wilson v. Nason*, 4 Bosw. 155; *Peters Box & L. Co. v. Lesh*, (Ind.) 20 N. E., 291; *Grand Rapids Co. v. Lyon*, (Mich.) 41 N. W. 497.

² *Dufresne v. Hutchinson*, 3 Taunt. 117; *Sarjeant v. Blunt*, 16 John. 74; *Scott v. Rogers*, 31 N. Y. 676.

³ *Hyde v. Noble*, 13 N. H. 494; *Loeschman v. Machin*, 2 Stark, 311; *Herron v. Hughes*, 25 Cal. 556; *Parsons v. Webb*, 8 Green (Me.), 38; *Calvin v. Bacon*, 11 Me. 28.

upon the assumption that the title of the original owner remains unimpaired by any fraudulent act of the bailee; that the bailee, having no title in himself, cannot convey any by sale or transfer, and that a purchaser from such bailee takes no title, but simply a possession without other right.¹ It is a rule of law that mere possession of chattels will not authorize a transfer of a better title than the possessor had. Thus a servant who sells his master's goods without authority can convey no title. And where a servant quits his master's employ and takes away the master's goods, it is a conversion, and replevin without demand will lie.² And where a mortgagor of chattels in Illinois took them to Indiana and sold them, the court held that the mortgagee in a proper case could recover them.³

§ 210. **Bailee may replevy from a stranger to the title.** Special property in goods may enable a party to sue in his own name in replevin or trover. Where the entire property is in the consignor, he is the proper party to sue; where the entire property is in the consignee, he is the proper party to sue; where both are interested, the one as general, the other as special owner, either may sue. A recovery in such action, properly instituted, will be a bar to any subsequent action against the same defendant at the suit of another party having either a general or special property in the goods.⁴ A bailee, with whom a yoke of oxen are left "as a pawn or indemnity" for the return of a hired horse,

¹ *Ingersoll v. Emmerson*, 1 Carter (Ind.), 79; *Stevens v. Cunningham*, 3 Allen (Mass.), 492. See *Nash v. Mosher*, 19 Wend. 431; *Trudo v. Anderson*, 10 Mich. 357; *Ballou v. O'Brien*, 20 Mich. 304; 2 Kent, 324; *Hilliard on Sales*, 23; 1 *Parsons on Contracts*, 44.

² *Pillsbury v. Webb*, 33 Barb. 214; *Trudo v. Anderson*, 10 Mich. 357; *Hotchkiss v. Hunt*, 49 Me. 213; *Covill v. Hill*, 4 Denio, 327.

³ *Blystone v. Burgett*, 10 Ind. 28; *Offutt v. Flagg*, 10 N. H. 46; *Jones v. Taylor*, 30 Vt. 42; *Martin v. Hill*, 12 Barb. 631; *Barker v. Stacy*, 25 Miss. 447; *Williams v. Merle*, 11 Wend. 80; *Dyer v. Pearson*, 10 E. C. L. 38; *Ingersoll v. Emmerson*, 1 Carter (Ind.), 78; *Stanley v. Gaylord*, 1 Cush. 536; *Kitchell v. Vanader*, 1 Blackf. (Ind.) 356.

⁴ *Denver v. Frame*, 6 Col. 382. See *Mechem on Agency*, 1041.

may maintain detinue for them against any person who does not show a better title.¹

§ 211. **Bailee may successfully defend against the owner as well as a stranger.** One in the rightful possession of property as bailee can maintain replevin against one who interferes with his possession.² The right of immediate possession may sometimes be in one person while the title may be in another. A bailee may have a right to the immediate possession by virtue of a lien for services bestowed or a contract for possession for a certain time as yet unexpired, and in such case the special owner may maintain replevin even against the general owner. In such cases the defendant is not obliged to show title against the world, but only to show a right to possession as against the plaintiff at the time the suit was begun.³ A bailee of goods, when sued, may show that his bailor did not own them. He is under no obligations to resist a claim made by another person which appears to be *bona fide* but should notify his bailor of the claim before he surrenders possession. So that he could defend if he saw fit.⁴ Where A delivered a package to B to be delivered to C, C, on demand of and refusal by B, may maintain replevin against B for the package.⁵

§ 212. **Where the terms of the bailment are violated replevin may be brought at once by the owner.** Where one violates the terms of a bailment of personal property by removing it from the place where alone he was entitled to use it, or by selling it, the rule is similar. His wrongful act terminates his possession, and the bailor has a right to it

¹ Noles v. Marable, 50 Ala. 366. See 1 Chitt. Pl. 122; Reese v. Harris, 27 Ala. 301; Parsons v. Boyd, 20 Ala. 112.

² Hopper v. Miller, 76 N. C. 402.

³ Bowen v. Fenner, 40 Barb. 385; Lummons v. Austin, 36 Mo. 308; Childs v. Childs, 13 Wis. 90; McLaughlin v. Piatti, 27 Cal. 452; Roberts v. Wyatt, 2 Taunt. 268; Burton v. Hough, 6 Mod. 334; Pain v. Whitaker, Ry. & M. 99; Ingersoll v. Emmerson, 1 Carter (Ind.), 78; Dunning v. South, 62 Ill. 176; Williams v. West, 2 Ohio St. 83.

⁴ Learned v. Bryant, 13 Mass. 224.

⁵ Magdeburg v. Uihlein, 53 Wis. 165 (10 N. W. 363).

immediately.¹ A bailor has no right of action against the bailee until the termination of the bailment. He may then bring replevin without demand.² Where one hires a horse to make a particular journey, and goes further, he is liable, and the owner might sustain replevin or trover; but if, on his return, he informs the owner of his increased journey, and he accepts payment therefor, it is a waiver of the conversion.³

§ 213. **Where a bailee pledges goods without authority, replevin will lie at once.** When the owner of pork stored in a warehouse intrusted the warehouse receipts to an agent for the purpose of repacking it, and the agent pledged the receipts as collateral for a loan of money, and on default the lender sold the pork, the real owner was permitted to sustain replevin against the innocent purchaser.⁴ Where goods were shipped by the owner to an agent, to be held as the property of the owner until disposed of, and the agent pledged them for a loan of money, the owner can maintain replevin for them.⁵

§ 214. **A pretended sale by a drunken bailee no protection.** A taking under color of a contract of purchase from a mere bailee, made when such bailee was drunk, whether made so for the purpose or not, is tortious, and the owner of the property may maintain replevin therefor.⁶

§ 215. **Bailee's interest may be levied on and sold, and bailor cannot replevy.** As a general rule, property in the hands of a bailee for a limited time without fraud is not liable to be taken for the bailee's debts, and where so taken the general owner may bring replevin at once.⁷ But it has been frequently held that where the bailee had a definite

¹ Billings v. Tucker, 6 Gray, 368; Wade v. Mason, 12 Gray, 335; Farrant v. Thompson, 5 B. & Ald. 826.

² Felton v. Hales, 67 N. C. 107.

³ Rotch v. Hawes, 12 Pick. 136.

⁴ Burton v. Curyea, 40 Ill. 324.

⁵ Chicago T. & P. R. R. v. Lowell, 60 Cal. 454.

⁶ Drummond v. Hopper, 4 Harr. (Del.) 327.

⁷ Robinson v. Champlin, 9 Iowa, 91.

right of possession for a certain time, and that right of possession was levied on and sold, the bailor could not replevy from the purchaser until the time had expired. In other words, by the sale the purchaser stepped into the position of the original bailee by operation of law.¹

§ 216. **But if the whole thing be levied on, replevin will lie by the real owner.** When goods in the hands of a bailee are attached as his property, replevin lies against the attaching officer by the real owner, although the goods are still in the hands of the bailee, not having been moved by the officer, and the attachment is pending and not dissolved.² The bailor may declare the bailment at an end, and bring replevin whenever the bailee violates the terms of the bailment, and this he does when he allows the whole interest to be levied on for his own debt.

§ 217. **A bailee of property cannot dispute the title of his bailor,** and where the bailee borrowed a pair of mules of the bailor, making no mention of any claim of title in himself or wife, he cannot, on replevin by the bailor, set up title in his wife and plaintiff jointly to defeat plaintiff's recovery.³ A borrower must restore property before he can

¹ *Caldwell v. Cowan*, 9 Yerg. (Tenn.) 262; *Hunt v. Strew*, 33 Mich. 85; *Smith v. Plomer*, 15 East, 607; *Bruce v. Westervelt*, 2 E. D. Smith (N. Y.), 240; *Cox v. Hardin*, 4 East. 211; *Forth v. Pursley*, 82 Ill. 152; *Collins v. Evans*, 15 Pick. 63; *Wheeler v. Train*, 3 Pick. 255; *Gordon v. Harper*, 7 Durnf. & East. 10, and 6; *Dixon v. Thatcher*, 14 Ark. 144; *Wyman v. Dorr*, 3 Me. 183; *Templeman's Case*, 10 Mod. 25.

² *Ralston v. Black*, 15 Iowa, 47. See on this point *Small v. Hutchins*, 20 Me. 255; *Illsley v. Stubbs*, 5 Mass. 280; *Bouldin v. Alexander*, 7 B. Mon. (Ky.) 424; *Thompson v. Button*, 14 Johns. (N. Y.) 84; *Judd v. Fox*, 9 Cow. (N. Y.) 259; *Hall v. Tuttle*, 2 Wend. (N. Y.) 475; *Phillips v. Harris*, 3 Marsh, Ky. 121.

³ *Pulliam v. Burlingame*, 81 Mo. 111. On this general subject see *Welles v. Thornton*, 45 Barb. 390; *Bates v. Stanton*, 1 Duer. 79; *Blivin v. R. R. Co.* 36 N. Y. 403; *Burton v. Wilkinson*, 18 Vt. 186; *Aubery v. Fiske*, 36 N. Y. 47; *McKay v. Draper*, 27 N. Y. 256; *Sinclair v. Murphy*, 14 Mich. 392; *Osgood v. Nichols*, 5 Gray, 420; *The Idaho*, 93 U.S. 575; *Matheny v. Mason*, 73 Mo. 677; *Bigelow on Estoppel* (3 Ed.), 430; *Edwards on Bailment* (2d ed.), § 73.

assert title in himself.¹ But where one obtained goods fraudulently, and bailed them to another, the bailee may surrender to the true owner, and may show such fact as a bar to any suit against him by his bailor.² A receiptor of an officer will not be permitted to set up title in himself as against the officer.³

§ 218. **The general owner must tender amount of lien.** A bailor cannot retake property by replevin upon which the bailee has a lien, without tendering the amount due, although the bailee has demanded an excessive amount.⁴ If a bailee, for hire for a limited term, with a right to purchase the goods upon payment of a certain price, sells the goods without having completed payment therefor, the bailment is thereby ended, and the owner may maintain replevin for the goods against the purchaser.⁵

¹ *Simpson v. Wrenn*, 50 Ill. 224.

² *Bates v. Stanton*, 1 Duer. (N. Y.) 79.

³ *Brusley v. Hamilton*, 15 Pick. 40.

⁴ *Monteith v. Great Western Pr. Co.*, 16 Mo. App. 450.

⁵ *Partridge v. Philbrick*, 60 N. H. 556; *King v. Bates*, 57 N. H. 446. See also *Sargent v. Gile*, 8 N. H. 325; *Bailey v. Colby*, 34 N. H. 29; *McFarland v. Farmer*, 42 N. H. 386.

CHAPTER X.

PARTNERS—JOINT OWNERS TENANTS IN COMMON.

	Section.		Section.
General rule	219	Where it is agreed that one shall have exclusive possession, that one can replevy from his co-tenants	233
As to what constitutes a partnership or joint ownership	220	The same—Tenants in common	234
Right of officer to seize partnership property—Not settled	221	Where by agreement one is to have exclusive possession, replevin will not lie by the other	235
One partner may replevy from an officer seizing the whole property for the debt of the other partner	222	Where one of two tenants in common convert the whole property, the other may replevy his interest	236
The same—Both owners can join and replevy	223	Joint tenancy is a matter of defense	237
One partner, entitled to exclusive possession, may	224	Replevin will not lie for an undivided interest	238
The interest of partners—How considered	225	It will not lie where the property of joint owners is not susceptible of division	239
Effect of sale by one partner of his interest	226	It will not lie where the result would be to deprive a part owner of possession	240
Joint owners should join in replevin	227	When one joint owner may sever the property by his own act, without injury to the other, it will lie	241
Replevin by purchaser of partnership property attached by creditor of the firm	228	Effect of severance by sale by one joint tenant	242
A tenant in common can not replevy from an officer who has taken the whole on a writ against his co-tenant	229	Pledge by one joint owner is good as to his interest, and replevin will not lie by the other	243
One joint tenant cannot sustain replevin against his co-tenant	230		
The same	231		
And a levy on the interests of one is no excuse for replevin by the other	232		

§ 219. As a general rule, one partner, joint owner, or tenant in common cannot replevy from another joint owner,

tenant in common, or partner, and all of the tenants in common must join in an action to recover possession of the common property.¹

§ 220. **As to what constitutes a partnership or joint ownership.** It is difficult to lay down a rule within the limits allowed to that question in this work; the following decisions may throw some light on the matter. Where logs had been delivered to a sawing company to saw and take their pay in part of the proceeds of the lumber, the plaintiff who furnished the logs was allowed to replevy the lumber when attached as the property of the sawing company,² the company not being joint owners thereof. A father who stocked up a farm, and put his son on it to make a living, if he could, without transfer of title to the son, may maintain replevin for the property seized for the son's debts where it does not appear that the son represented it as his own property or that the debt was contracted on the faith of its being the son's property.³ A contract provided that K. should furnish and replenish a stock of merchandise which N. was to take charge of and sell, deducting from the proceeds the expenses of the business and a certain fixed sum for himself, the profits of the business to be divided equally, and N. to take his share thereof, at the expiration of the contract, out of the merchandise on hand, *held*, that the contract created a partnership, notwithstanding a stipulation that the goods were to remain the property of K., and that K. could not maintain replevin for the goods until after a settlement.⁴ A principal who furnished money to an agent to buy and crib corn may bring replevin for the corn. They are not tenants in common.⁵ Where M. furnished her sons money to purchase and feed cattle, with the understanding that the title was to remain in her, and the cattle could only be sold by

¹ Freeman on Co-ten. & Part. 289, 337-8, 355; Bates on Part. 274-5.

² Bassett v. Armstrong, 6 Mich. 397.

³ Morgan v. Pierson, 64 Wis. 523 (25 N. W. 543).

⁴ Kuhn v. Newman, 49 Iowa, 424.

⁵ Dows v. Morse, 62 Iowa, 231 (17 N. W. 495).

her consent, *held*, that replevin would not lie by the sons or their administrators.¹ Where a sheriff holds under levy an undivided interest of property, only that undivided interest may be replevied by one claiming to be the owner.² But it has been held that a sheriff may levy on and sell one partner's interest in partnership property for the individual debts of that partner.³

§ 221. **Right to seize partnership property not well settled.** But as to the officer's right to take possession of the firm property on a writ against only one of the partners to the exclusion of the other, the authorities are not uniform. While none of them hold that the officer can interfere with the possession further than to protect his levy, still, many allow him to have exclusive possession of the firm property until sale.⁴ The practice must be governed by the statute.

§ 222. **One partner may replevy from an officer seizing the whole property for the debt of the other partner.** A partner is not merely a part owner of the partnership property; he has an entire as well as a joint interest in the whole of it, and is in some sense a trustee of the partnership assets as a trust fund for the payment of creditors. One partner is, therefore, entitled to bring replevin for the whole property

¹ Brown's Admx. v. Manning, 29 Cal. 602.

² Schenck v. Long, 67 Ind. 579.

³ Waldman v. Broder, 10 Cal. 378; Scrugham v. Carter, 12 Wend. 131; Hacker v. Johnson, 66 Me. 21.

⁴ Branch v. Wiseman, 51 Ind. 1; Ladd v. Billings, 15 Mass. 15; Crockett v. Crain, 33 N. H. 548; Newman v. Bean, 21 N. H. 93; Morrison v. Blodgett, 8 N. H. 238; Gibson v. Stevens, 7 N. H. 353; Treadwell v. Brown, 43 N. H. 290; Haydon v. Salk, 392; Shover v. White, 6 Munford (Va.), 110; Mersereau v. Norton, 15 Johns. 179; Skipp v. Harwood, 2 Swanst. 586; Johnson v. Evans, 7 Mon. & G. 240; Whitney v. Ladd, 10 Vt. 165; Remington v. Cady, 10 Conn. 44; Walsh v. Adams, 3 Denio, 125; Jones v. Thompson, 12 Cal. 191; Moore v. Sample, 3 Ala. 319; Hardy v. Donnellan, 33 Ind. 501; Bernal v. Ho-yious, 17 Cal. 541; Sanders v. Young, 31 Miss. 111; White v. Jones, 38 Ill. 159; James v. Stratton, 32 Ill. 202; Goll v. Hinton, 8 Abb. Pr. 120; Rapp v. Vogel, 45 Mo. 524; Lawrence v. Burnham, 4 Nev. 361.

if it is seized on execution for the individual debt of the other partner.¹

§ 223. **The same—Both owners can join and replevy.** Where an officer attaches partnership property on a writ against one of the partners alone, replevin will lie against him by the owners.²

§ 224. **One partner entitled to exclusive possession may.** Ordinarily, replevin does not lie by one partner against the other, but where they have dissolved and agreed that one partner should take the firm property for a specific purpose, the case is different, and replevin or trover will lie.³ Or where the partners have agreed that one should have exclusive possession, or where, for the carrying on the business, it is necessary that one should have exclusive control and possession, he can maintain replevin.⁴ Partnership accounts cannot be settled in replevin.⁵ Where by the terms of a partnership one partner is entitled to the exclusive possession and control of certain part of the firm property, the other cannot interfere with such possession, and for a violent or fraudulent taking possessory action will lie.⁶

¹ *Hutchinson v. Dubois*, 45 Mich. 143 (7 N. W. 714). In this case the officer did not levy on the debtor's interest in the partnership property, but upon the whole property, and took full possession of it, excluding the plaintiff in replevin from all control over it. Where this is allowed by statute, this case would not be authority.

² *Fay v. Duggan*, 135 Mass. 242. This is on the ground that the levy on the full interest in the property and the exclusion of the firm from all control over it was a trespass. See *Sanborn v. Royce*, 132 Mass. 594; *Bank v. Carrollton R. R.* 11 Wall. 624-9; *Cropper v. Coburn*, 2 Curtis, 465; *Burnell v. Hunt*, 5 Jur. 650; *Garvin v. Paul*, 47 N. H. 158; *Durborrow's appeal*, 84 Penn. St. 404; *Haynes v. Knowles*, 36 Mich. 407; *Levy v. Cowan*, 27 La. Ann. 556.

³ *Bartley v. Williams*, 66 Pa. 329.

⁴ *Rich v. Ryder*, 105 Mass. 306. In this case the master of the ship was also a part owner, and when his possession was interfered with by the other owners he brought replevin, claiming that he was entitled to the possession as master and agent of the ship owners for the purpose of closing up the business of the last voyage.

⁵ *Candler v. Lincoln*, 52 Ill. 76.

⁶ *Ivey v. Hammock*, 68 Ga. 428.

§ 225. **The interest of partners—How considered.** The interest of a partner is not to be regarded as a specific share in the goods owned by them, but rather an interest in the surplus after the firm debts are paid.¹ Where two parties are jointly in possession of property as croppers, there must be such a division as will put each in possession of his part of the property in his own right, before a possessory warrant will lie in favor of one, or his legal representatives in case of his death, against the other, or a purchaser from him to recover any portion of the joint property.²

§ 226. **Sale by one partner of his interest is a dissolution of the partnership,** and the purchaser does not become a partner, and if the other partner refuses to admit him into possession of the property, he cannot maintain replevin for the interest so purchased.³

§ 227. **Joint owners should join in replevin.** A joint owner of personal property can maintain replevin in his own name to recover it against one whose right to it is not superior to his.⁴ Where their rights are distinct, or to separate parts, they cannot join to replevy it. But ordinarily, where the property is owned by several, they must all join in an action to replevy it, even as against a third party.⁵

¹ *Garvin v. Paul*, 47 N. H. 163.

² *Peebles v. Morris*, 77 Ga. 536; *Usry v. Rainwater*, 40 Ga. 328.

³ *Reece v. Hoyt*, 4 Port. (Ind.) 169. As to the rights of a partner on the death of his co-partner, see *Putnam v. Parker*, 55 Me. 236. This matter depends largely on statute, and is hardly within the scope of this work, but see *Klotz v. Macrady* (La.), 2 So. 283; *Gleason v. White*, 34 Cal 258; *Appeal of Shipe* (Pa.), 6 Atl. 103; *Dyer v. Clark*, 5 Met. 562 (39 Am. Dec. 697).

⁴ *Chaffee v. Harrington*, 60 Vt. 718 (15 A. 350).

⁵ *McArthur v. Lane*, 15 Me. 245; *Chambers v. Hunt*, 18 N. J. L. 339; *Walker v. Fenner*, 28 Ala. 373; *Reinheimer v. Hemingway*, 35 Pa. St. 435; *Dunott v. Hagerman*, 8 Cow. 220; *Coryton v. Lithebye*, 2 Saund. 116; *Glover v. Hunnewell*, 6 Pick. 222; *Owings v. Owings*, 1 Har. & Gill. (Md.) 484; *Barry v. Rogers*, 2 Bibb 314; *Hinchman v. Patterson Co.* 17 N. J. Eq. 75; *Decker v. Livingston*, 15 John. 479; *Portland Bank v. Stubbs*, 6 Mass. 422; *Dewolf v. Harris*, 4 Mason, C. C. 515; *Eakin v. Eakin*, 63 Ill. 160; *Colton v. Mott*, 15 Wend. 619; *Pickering v. Picker-*

One of two joint owners of goods cannot maintain replevin against a stranger.¹ But where the stranger is a wrongdoer without the shadow of right, one joint owner has been allowed to maintain replevin.² A tenant in common, who is entitled to the possession of an undivided interest in personal property, can maintain replevin against a wrongdoer who is a stranger to the title.³

§ 228. **Replevin by purchaser of partnership property attached by creditor of the firm.** Where one partner *bona fide*, with the consent of his co-partner, sold the firm property to satisfy his individual indebtedness, the purchaser may maintain replevin against one who attaches it for a firm debt, where it is not shown that the firm debt was contracted on the faith of that property.⁴ Where the interest of one partner is sold at sheriff's or executor's sale, the purchaser becomes a *quasi* tenant in common with the other partners, so far as to entitle him to an account, but not to the exclusive possession of any part of the property, and he cannot maintain replevin therefor.⁵ A member of a firm may maintain replevin for his interest as a partner in the firm property against a stranger.⁶

§ 229. **A tenant in common cannot replevy from an officer who has taken the whole on a writ against his co-tenant.** A tenant in common does not have such an interest that he can maintain replevin against an officer who has taken the

ing, 11 N. H. 141; *Gilmore v. Wilbur*, 12 Pick. 120; *Hilliard on torts* II. 320-280; *Freeman on Co-ten. and Part.* 337-8.

¹ *McArthur v. Lane*, 15 Me. 245.

² *Schwartz v. Skinner*, 47 Cal. 6; *DeWolf v. Harris*, 4 Mason, C. C. 515. To maintain the replevin, the plaintiff should found his right upon a prior peaceful possession, rather than on ownership, for as to his co-tenant's part he has no greater right than a stranger. See *Hunt v. Chambers*, 1 Zab. (N. J.) 623; *Chambers v. Hunt*, 18 N. J. L. 339; *Barnes v. Bartlett*, 15 Pick. 75; *McEldery v. Flannagan*, 1 Har. & G. (Md.) 308; *Russell v. Allen*, 3 Kern. (N. Y.) 178; *Wilson v. Gray*, 8 Watts, 35; *Deacon v. Powers*, 57 Ind. 489.

³ *McArthur v. Oliver*, 60 Mich. 605 (27 N. W. 689).

⁴ *Stokes v. Stevens*, 40 Cal. 391.

⁵ *Reinheimer v. Hemingway*, 35 Pa. St. 435.

⁶ *Bostick v. Buttain*, 25 Ark. 482.

whole under a writ against the co-tenant, even if he has given bond and taken possession.¹ Where two parties were owners in common of hay, and writs of attachment against one of them were levied upon the hay, *held*, that the sheriff had the right to the possession of all the hay until sale, and that the other owner could not maintain replevin for his share before sale and division.²

§ 230. **One joint tenant cannot sustain replevin against his co-tenant** for the possession of the property thus owned by them in common, for the reason that the possession of neither can be said to be wrongful as to the other, each having an equal right to possession of the joint property. If he sues for the moiety, the court will *ex officio* abate the writ, but if he sues for the whole, it can only be taken advantage of by a plea in abatement.³ A tenant in common cannot maintain replevin against his co-tenant.⁴ One tenant in common cannot maintain replevin against his co-tenant for his part of the common crop, unless there has been a division of it, consummated by an assignment and appropriation of a part to each.⁵ But where plaintiff had a lien upon three bales of cotton, part of a crop, and all of the cotton had been removed except about enough to make three bales, and that had been taken possession of by a stranger, *held*, that he could maintain replevin for it as three bales of cotton.⁶ Replevin cannot be maintained against a defendant for one

¹ Ladd v. Billings, 15 Mass. 15.

² Lawrence v. Burnham, 4 Nev. 361.

³ DeWolf v. Harris, 4 Mass. 515.

⁴ Barnes v. Bartlett, 15 Pick. (Mass.) 71; Wills v. Noyes, 12 Pick. (Mass.) 324; Silloway v. Brown, 12 Allen (Mass.), 30; Marsh v. Pier, 4 Rowle, 273; Chambers v. Hunt, 3 Har. (18 N. J.) 339; Harrison v. McIntosh, 1 John. 380; Reinheimer v. Hemingway, 35 Pa. St. 435; Culum v. Bevans, 6 Har. & J. (Md.) 469; Smith v. Rice, 56 Ala. 417; Prentice v. Ladd, 12 Conn. 331; Russel v. Allen, 13 N. Y. 173; Wilson v. Reed, 3 John. 117; Ellis v. Culver, 1 Har. (Del.) 76; Barnes v. Bartlett, 15 Pick. 71; Freeman on Co-ten. & Part. 289.

⁵ Ward v. Worthington, 33 Ark. 830.

⁶ Washington v. Love, 34 Ark. 93; Jarroll v. McDaniel, 32 Ark. 595.

bale of cotton of which he is part owner, neither can it be maintained for a certain number of bales out of a crop of cotton until separation or designation of the specific property.¹

§ 231. **The same.** One of two or more joint owners of personal property incapable of division cannot maintain replevin against his co-owners.² Replevin or its statutory substitute cannot be maintained by one joint owner of personal property against his co-owner for the obvious reason that neither is entitled to the *immediate* and *exclusive* possession of such property.³ One part owner of a chattel cannot maintain replevin against another part owner, and in such an action it is not proper to render judgment for possession or for the value of such part.⁴ In the absence of some special agreement for possession one joint owner cannot, by an action of replevin, take from the other the property owned in common.⁵ Where one joint owner brings replevin against another, on this fact being found by the jury, the court should order a return of the property; or, in case of a failure to return, render judgment for the full value of the property in favor of defendant. No accounting can be had in a replevin action.⁶ A tenant in common cannot maintain replevin against a co-tenant because they have each and equally a right of possession.⁷

¹ Person v. Wright, 35 Ark. 169.

² Hill v. Seager, 3 Utah, 379 (3 Pac. 545); Davis v. Soltish, 46 N. Y. 393; Walker v. Fenner, 28 Ala. 373; Kimball v. Thompson, 4 Cush. 441; Crabtree v. Chapham, 67 Me. 326.

³ Cross v. Hulett, 53 Mo. 397; Wells v. Noyes, 12 Pick. 324; 2 Greenl. Ev. § 563, 646-8; 6 Bac. Abd. 697; Lisenby v. Phelps, 71 Mo. 522; Pulliam v. Burlingame, 81 Mo. 111; Chambers v. Hunt, 22 N. J. L., (2 Zab.) 552; Holton v. Binns, 40 Miss. 491.

⁴ Mills v. Malott, 43 Ind. 248; Bowen v. Roach, 78 Ind. 361.

⁵ Hudson v. Swan, 7 Abb. New Cas. (N. Y.) 324; Reynolds v. McCormick, 62 Ill. 412.

⁶ Walker v. Spring, 5 Hun. (N. Y.) 107.

⁷ Bohlen v. Arthurs, 115 U. S. 482 (6 F. 114); Wilson v. Gray, 8 Watts (Pa.), 25.

§ 232. And a levy on the interest of one is no excuse for replevin by the other. Replevin cannot be maintained either at common law or under the code by one joint owner of a personal chattel against another joint owner, for a taking away of the joint property by virtue of a writ of attachment against a third person.¹ A different rule prevails in some states by statute.

§ 233. Under an agreement that one joint owner is to have exclusive possession, he may maintain replevin against a stranger or his co-tenant. When, by the agreement of all the joint owners, one is to have exclusive possession for a purpose, he may replevy in his own name against a stranger or his co-tenants.² So where the joint owners agree that a servant or agent shall have exclusive custody of the property, the agent may replevy from anyone interfering with that custody.³ Where a partnership was for the manufacture of saddles, and one partner was to furnish all the stock, and the other do all the work, and the stock was seized on a process against the working partner alone before any work was done on it, *held*, that the one who furnished the stock could replevy it as his own.⁴

§ 234. The same—Tenants in common. The tenant entitled by agreement to the exclusive possession of the common property may maintain replevin against his co-tenants who have or hold possession in violation of the agreement.⁵ And where it has been previously agreed that one was to have control as security for advancements made, and was to sell the product, he may maintain replevin in his own name.⁶ A partner in a chattel who has the exclusive right to control

¹ *Prentice v. Ladd*, 12 Conn. 331; *McElroy v. Flannagan*, 1 Har. & G. (Md.) 308; *Scrugham v. Carter*, 12 Wend. (N. Y.) 131; *Lawrence v. Burnham*, 4 Nev. 361.

² *Newton v. Gardner*, 24 Wis. 232; *Corbitt v. Lewis*, 53 Pa. St. 331.

³ *Rich v. Ryder*, 105 Mass. 307.

⁴ *Boynton v. Page*, 13 Wend. 425.

⁵ *Morgan v. Hedges*, 4 Col. 526; *Newton v. Gardner*, 24 Wis. 232.

⁶ *Pierce v. Jackson*, 56 Ala. 599.

and sell it may maintain replevin for it against the vendee of his co-partner, who has notice of their agreement.¹

§ 235. Where by agreement one is to have exclusive possession, replevin will not lie by the other. Neither of the tenants in common of personal property, where there is an agreement that it shall be delivered by one to the other to be sold, or shipped to a commission merchant and sold, and the proceeds to be equally divided, can maintain replevin against the other, nor against the vendee of the other to recover it.² But when a certain part of a cargo was sold by agreement of all the joint owners, *held*, that it conveyed a good title, and that replevin would lie by the purchaser.³

§ 236. Where one of two tenants in common converts the whole property, the other may replevy his interest. A tenant in common in personal property may maintain replevin against his co-tenant who has taken possession of the common property and converted it to his own use.⁴ Claim and delivery by one tenant in common against another can only be maintained where the property has been destroyed or carried beyond the limits of the state.⁵ When a partner makes a use of the firm property not contemplated by the terms of the agreement of the co-partnership, he at once becomes a trespasser and wrongdoer.

§ 237. Joint tenancy is a matter of defense, and when pleaded by defendant is the subject of proof, and is one of the issues to be passed upon by the jury, the court directing them to find first whether there exists a joint tenancy, and, if so, to find for the defendant.⁶ But where the fact of the

¹ Harkey v. Tellman, 40 Ark. 551.

² Hewlett v. Owens, 50 Cal. 474.

³ Seldon v. Hickok, 2 (Cain's Cases) N. Y. Term R. 166.

⁴ Swartz v. Skinner, 47 Cal. 3. In this case, plaintiff alleged his interest and asked possession of the property or judgment for the amount of his interest.

⁵ Strauss v. Crawford, 89 N. C. 149.

⁶ Belcher v. Van Duzen, 37 Ill. 282. See Hunt v. Chambers, 1 Zab. (N. J.) 620; Chambers v. Hunt, 2 Zab. (22 N. J.) 554; Holton v. Binns, 40 Miss. 491; Dewolf v. Harris, 4 Mason C. C. 515.

joint tenancy appears on the face of the papers, it is ground for motion to dismiss or demurrer, and will usually abate the writ.¹ The non-joinder of tenants or owners in common as plaintiffs or defendants cannot be taken advantage of under the general issue, but must be raised by plea in abatement.²

§ 238. **Replevin will not lie for an undivided interest.** A part owner of a vessel cannot maintain replevin for his undivided part, although he owns a majority interest in the vessel.³ An action will not lie for an undivided interest in a chattel, nor can such tenant in common sue alone as against a stranger in possession.⁴ The plaintiff must have a right to a whole and entire interest.⁵ Where replevin was brought for one-third of 17-32 parts of a lot of wheat against the owner of the other interest, *held*, that the interest sued for was such an undivided interest that replevin would not lie.⁶ A different rule prevails where the property can be separated into aliquot parts, and the interest of plaintiff is easily separable as one-third of sixty bushels of wheat.

§ 239. **It will not lie where the property of joint owners is not susceptible of division**, as in the case of a growing crop, or in the case of a joint ownership of a single piece of property, replevin will not lie by one joint owner, because the property sought to be recovered is not susceptible of

¹ Hart v. Fitzgerald, 2 Mass. 509.

² Bartlett v. Goodwin, 71 Me. 350.

³ Hackett v. Potter, 131 Mass. 50. On this general subject see Hart v. Fitzgerald, 2 Mass. 509; Gardner v. Dutch, 9 Mass. 427; Ladd v. Billings, 15 Mass. 15; Kimball v. Thompson, 4 Cush. 441; Webster v. Vandeventer, 6 Gray, 428.

⁴ Spooner v. Ross, 24 Mo. App. 599; Keegan v. Cox, 116 Mass. 289; Jackson v. Stockard, 9 Bax (Tenn.), 260. Here replevin was brought for three-fourths of three bales of cotton. Kindy v. Green, 32 Mich. 310; Price v. Talley's Adm'rs. 18 Ala. 21; Parsons v. Boyd, 20 Ala. 112; Hart v. Fitzgerald, 2 Mass. 509; Kimball v. Thompson, 4 Cush. (Mass.) 447.

⁵ Frierson v. Frierson, 21 Ala. 590; Bell v. Hogen, 1 Stewart (Ala.), 536; Miller v. Eatman, 11 Ala. 609.

⁶ Humphrey v. Boyn, 45 Mich. 565 (8 N. W. 556.)

seizure and delivery to the plaintiff.¹ In an action of replevin for an undivided interest in a crop of wheat standing in shocks, the defendant, having no interest in the other undivided one-half, cannot raise the point that, the wheat being undivided when the writ issued, the action could not be maintained.²

§ 240. **It will not lie where the result would be to deprive a part owner of possession.** Replevin will not lie for an undivided interest in a chattel where the execution of the writ will operate to deprive a co-tenant, whose title is not disputed, of his right of possession.³

§ 241. **When one joint owner may sever the property by his own act without injury to the other, it will lie.** Thus, where the partnership property was coffee in bags, the court said each partner could have taken the number of bags which belonged to him by his own selection.⁴ But where the property was corn put in two separate cribs, but without any formal division or separation, it was held not sufficient division to support replevin by one against the other.⁵ Where the property is of such a nature that one may take his share without injury to the other, replevin has been allowed.⁶ Or where goods, part of a larger number, are purchased, the purchaser to select his part, he may make the selection and maintain replevin at any time. Such a purchase does not make him either a partner or tenant in common of the whole after selection.⁷

§ 242. **Effect of a severance by sale by one joint tenant.** Where one tenant in common sells the right to a stranger to cut timber off of the common property, another ten-

¹ Read v. Middleton, 62 Iowa, 317 (17 N. W. 532); Jones v. Dodge, 61 Mo. 368.

² Crapo v. Seybold, 36 Mich. 444.

³ Kendy v. Green, 32 Mich. 310.

⁴ Gardner v. Dutch, 9 Mass. 427.

⁵ Usry v. Rainwater, 40 Ga. 328.

⁶ Forbes v. Shattuck, 22 Barb. 568; Tripp v. Riley, 15 Barb. 334.

⁷ Clark v. Griffiths, 24 N. Y. 596; McLaughlin v. Piatti, 27 Cal. 452.

ant in common of the same property cannot maintain replevin for the timber after it has been so cut.¹ Replevin will not lie by one tenant in common of a chattel against another for taking the chattel, and if one of them sells his interest to a third party he has the right to deliver the chattel to the purchaser, and neither he nor any one assisting him in so doing is liable to an action.² If tenants in common of personal property make separate conveyances thereof to a purchaser, one of which conveyances is fraudulent and void, the purchaser cannot maintain replevin against an officer attaching the same as the property of the vendor.³

§ 243. Pledge by one joint owner is good as to his interest, and the other joint owner cannot replevy from the pledgee. Where one joint owner of a chattel pledges it to a third person, such pledge is good to the extent of the pledgor's right, and the other owner cannot recover in replevin.⁴ Tenants in common of personal property are equally entitled to the possession and use of it; and where one of two persons owning chattels in common has mortgaged his share to the other he cannot maintain replevin therefor against the mortgagee, especially if he has made no offer to pay the debt or redeem.⁵

¹ *Alford v. Bradeen*, 1 Nev. 228. See *Baker v. Wheeler*, 8 Wend. (N. Y.) 505.

² *Hudson v. Swan*, 83 N. Y. 552.

³ *Kimball v. Thompson*, 4 Cush. (Mass.) 441.

⁴ *Frans v. Young*, 24 Iowa, 375.

⁵ *Kline v. Kline*, 49 Mich. 419 (13 N. W. 800).

CHAPTER XI.

VENDOR AND VENDEE.

Section.	Section.
Right of vendor to replevy property sold . . . 244	Where it is impossible to restore, will not be required . 260
The same 245	When offer to restore must be made 261
Where the vendor reserves title in himself . . . 246	Sale induced by fraud of vendee 262
Where title reserved, vendor may replevy from assignee. 247	A vendor may reclaim property obtained from him by fraud 263
Where title is reserved and default is made the vendor may replevy without tender back of partial payment . 248	A contract of exchange . . 264
The same—May replevy even from U. S. marshal . . 249	Fraudulent purchaser takes a title voidable at the election of the defrauded vendor . 265
Where contract of sale is unconditional 250	It is not material when false representations were made so they preceded the consent of vendor—Meaning of consent 266
Will not lie where condition is waived and property delivered 251	What circumstances justify a rescission 267
Sale by sample a conditional sale. Death of vendee before delivery 252	When no questions are asked silence not fraud usually . 268
Use restricted to certain limits 253	Payments in counterfeit money 269
But goods on commission not a sale on condition . . 254	Where an infant pleads his minority 270
Stoppage in <i>transitu</i> —Replevin by vendor . . . 255	Non-payment no ground of rescission 271
Where property is sold on agreement to give a note . 256	Where an insolvent honestly though hopelessly endeavors to go on, no fraud . 272
Must offer to return note before suing 257	Completion of payment stopped by garnishment no ground for rescission . . 273
Must pay back partial payments received on a rescission 258	Failure of vendee may justify a rescission 274
Need not offer back payments made, where contract demanded 259	

	Section.		Section.
Must exercise his right of rescission promptly . . .	275	ment and replevy at the same time . . .	282
Rule where possession by consent but based on fraud .	276	Where sold on execution vs. buyer—Cannot be replevied	283
What acts constitute a return and rescission . . .	277	Will not lie against purchaser in good faith . . .	284
Effect and remedy on rescission of sale by vendor for fraud of vendee . . .	278	Goods obtained by fraud and levied on for debts of the vendee may be replevied .	285
Third persons, how affected— A defrauder, vendor of goods may re-claim . . .	279	Goods obtained by fraud and used to pay a pre-existing debt may be replevied by true owner . . .	286
May bring replevin and action for value at the same time .	280	Conditional sale—Vendee can sell his interest . . .	287
But cannot prove under bankrupt law and then replevy .	281	What is wrongful detention .	288
May claim under an assign-		Does not lie by vendee to enforce contract of sale . .	289

§ 244. Right of vendor to replevy property sold.

Where a vendor sells property on time or partly on time, delivering possession without reservation, he can only rescind the sale and reclaim the property by alleging and proving fraud in the contract of sale, which would avoid it; and if the property have in the meantime passed into the hands of innocent holders for value, it is beyond his reach, and he must take his chances with other creditors of his vendee. But if the contract of sale is that the title is to remain in the vendor until the property is fully paid for, or until other conditions of the sale are complied with, the vendor has usually been allowed to reclaim his property even in the hands of innocent third parties, if sold in violation of the contract with his contemplated vendee.¹

¹ *Wills v. Barrister*, 36 Vt. 220; *Jessop v. Miller*, 1 Keys (N. Y.), 321; *Bradshaw v. Warner*, 54 Ind. 58; *Deshon v. Bigelow*, 8 Gray, 159; *Tully v. Fairly*, 51 Ind. 311; *Hotchkiss v. Hunt*, 49 Me. 213; *Harris v. Smith*, 3 S. and R. (Pa.) 21; *Rowe v. Sharp*, 51 Pa. St. 27; *Hodson v. Warner*, 60 Ind. 214; *Leven v. Smith*, 1 Denio, 571; *Jennings v. Gage*, 13 Ill. 610; *Coghill v. Hartford, etc.*, 3 Gray, 545; *Meldrum v. Snow*, 9 Pick. 441; *Eaton v. Munroe*, 52 Me. 63; *Holmark v. Molin*, 5 Cold. (Tenn.), 482; *Burbank v. Crooker*, 7 Gray, 158; *Sargent v. Metcalf*, 5 Gray, 306.

§ 245. **The same.** Where the owner of personal property is induced to sell and deliver it by fraud, he may, upon discovery of the fraud, rescind the contract and recover the property from the vendee, but not from one who has purchased from the vendee without notice of the fraud. But where the owner sells and delivers the property, reserving the title until the performance of some condition, no title passes until the performance of the condition, and a purchaser from the vendee, though without notice of the condition, acquires no title to the property. The difference is, in the first case, the owner intentionally parts with the title; in the second, he expressly retains it, and his vendee has none to sell.¹

§ 246. **Where the vendor reserves title in himself.** A vendor may sell property and stipulate that the title shall remain in him until fully paid for, and such a title is sufficient to sustain replevin against a purchaser of his vendee.² On a conditional sale, where the seller reserves title to the property until payment of purchase money on default of payment thereof, as stipulated, the seller can maintain an action of replevin therefor.³ Where plaintiff was to have a horse if he paid for him by a certain day, and failed to pay for him within the time, and defendant took possession, *held*, that replevin would not lie in favor of plaintiff.⁴ And the assignee of the vendor's right may maintain replevin against the vendee on failure to comply with the conditions of the sale.⁵

§ 247. **Where title reserved, vendor may replevy from assignee.** Where goods were bought by a retailer with the understanding that the title was to remain in his vendor until paid for, and, before paid for, the retailer assigned, replevin will lie by the vendor against the assignee, though he

¹ *Andrews v. Cox*, 42 Ark. 473. See Schoulers P. P. § 511-569.

² *Grange Warehouse v. Owen*, 2 Pick. (86 Tenn.) 355 (7 S. W. 457); *Benner v. Puffer*, 114 Mass. 376; *Payne v. June*, 92 Ind. 252.

³ *Campbell Mfg. Co. v. Walker*, 22 Fla. 412 (1 So. 59); *McGinnis v. Savage*, 29 W. Va. 362 (18 E. 746).

⁴ *Jefferson v. Chase*, 1 Houst. Del. 219.

⁵ *Dufer v. Hayden* (Col.), 20 P. 617.

could not dispute the title of those who had bought in good faith portions of the goods in the usual course of trade.¹ An assignee is not a purchaser in good faith for value.

§ 248. **Where title is reserved and default is made, the vendor may replevy without tender back of partial payment.** Where property has been sold under a contract that title shall not pass from vendor until fully paid for, and that vendor may take possession at any time on default by vendee, vendor may maintain replevin at any time when vendee is in default without a tender back of amount already paid by vendee.² Where by the terms of the contract no title is to pass until the full performance of the contract by the vendee, on default, the vendor, after demand of payment or a return of the property, may replevy it from the vendee or his purchaser without payment or tender back of the partial payment received, and the vendee must look to a court of equity for his remedy for money paid.³

§ 249. **The same may bring replevin even from a United States marshal.** A vendor may replevy his goods from a United States marshal, who attached them as the property of a supposed purchaser, when he has not complied with the conditions of such sale, and they have not been waived.⁴ A firm in Omaha bought cigars in New York, for which they were to give their note, due in four months. Before the goods arrived, the purchasers went into bankruptcy. Some days after, the express messenger brought the goods to the store of the buyer, and the United States marshal then in possession of the store took them. The vendors were permitted to sustain replevin. Under the conditions of the sale—the note had not been given—the court presumed that the contract meant the note of the buyer solvent, not bankrupt.⁵

¹ Rogers v. Whitehouse, 71 Me. 222. (See assignee and § 282).

² Fleck v. Warner, 25 Kan. 492; Proctor v. Tilton (N. H.), 17 A. 638.

³ Duke v. Shackelford, 56 Miss. 552. See Pegk v. Bonbright, 75 Iowa, 98 (39 N. W. 213).

⁴ Maddux v. Usher, 2 Fox's Decisions, 261; Farley v. Lincoln, 51 N. H. 579.

⁵ Sutro v. Hoile, 2 Neb. 190. (See § 255-6).

§ 250. **Where contract of sale is unconditional, replevin will not lie in the absence of fraud.** Where a party sold mules by a bill of sale which was unconditional, it was *held*, that he could not maintain replevin against the purchaser or her husband on the ground that the price had not been paid. The bill of sale is conclusive evidence of title and the terms of the sale.¹

§ 251. **Neither will it lie where the condition is waived and property delivered.** If an owner sell chattels for cash, and waive the condition and deliver the chattels, he cannot maintain replevin.² A delivery without insisting on condition being performed is deemed a waiver of the condition, and replevin will not lie.³ Where, by a usage of trade, cash goods are delivered without insisting on instant payment, it is a question for the jury whether the seller intended to waive the condition or not.⁴

§ 252. **Sale by sample a conditional sale—Death of vendee before delivery.** Where goods were sold by sample and shipped to the vendee, who died before they reached their destination, *held*, that the contract was but an offer to sell, and that the administrator could not complete the sale by accepting the goods, and that the vendor could maintain replevin even though the administrator had listed the property as belonging to the estate.⁵

§ 253. **Use restricted to certain limits.** A vendor may make a conditional sale and restrict the use of the property within certain limits from which, if it is removed without

¹ *McNail v. Zeigler*, 68 Ill. 224.

² *Mixer v. Cook*, 31 Me. 340.

³ *Pitt v. Owen*, 9 Wis. 152; *Kinsey v. Leggett*, 71 N. Y. 387; *Leven v. Smith*, 1 Denio, 571; *Ives v. Humphreys*, 1 E. D. Smith, 196; *Smith v. Lynes*, 1 Seld. 43; *Lupin v. Marie*, 6 Wend. 77.

⁴ *Powell v. Bardlee*, 9 Gill & J. (Md.) 220. See *Hill v. Freeman*, 3 Cush. 257; *Keeler v. Field*, 1 Paige (C. H.), 312; *Hussey v. Thornton*, 4 Mass. 405; *Copland v. Bosquet*, 4 Wash. C. C. 588; *Smith v. Danie*, 6 Pick. 262.

⁵ *Smith v. Brennan*, 62 Mich. 349 (28 N. W. 892).

his consent, he may maintain replevin before default of payment.¹

§ 254. **But goods on commission not a sale on condition.** A consignment of goods to be sold on commission is not a conditional sale, and the consignor may maintain replevin against the assignee of the consignee for the recovery of such part of the goods as remained unsold in the consignee's hands when the latter made the assignment.²

§ 255. **Stoppage in transitu. Replevin by vendor.** Where the vendee, being about to fail, refused to receive a car-load of lumber; but a creditor paid the freight and attached it for a debt of the vendee, *held*, that the vendor could rescind the sale and maintain replevin against the officer for the lumber, but must pay the freight advanced.³ A vendee may replevin from a common carrier before delivery to the vendor of the articles sold.⁴ Where an officer attached goods in the hands of a carrier on a writ against the vendee, and paid the carrier's charges, and the vendor rescinded the sale and replevied the goods, *held*, that the transit did not end until delivery to the vendee, but as the vendor had not paid or tendered the officer the money paid by him to the carrier, he could not maintain the action.⁵ Where the vendee received them, but set them apart, intending to return them, *held*, vendor could replevy.⁶

§ 256. **Where property is sold on an agreement to give a note.** Where personal property is sold and delivered on the express condition that the title shall remain in the vendor until the vendee pays for it, or gives notes or security,

¹ Hall v. Draper, 20 Kan. 137.

² Peet v. Spencer, 90 Mo. 384 (2 S. W. 434); Burrell on Assignment, (4 Ed.) § 391.

³ Greve v. Dunham, 60 Iowa, 108 (14 N. W. 130). The vendor's right of stoppage *in transitu* is only terminated when the goods pass into the possession of the vendee. McFittridge v. Piper, 40 Iowa, 627.

⁴ C. B. & Q. R. R. Co. v. Painter, 15 Neb. 394 (19 N. W. 488).

⁵ Rucker v. Donovan, 13 Kan. 251. See Nicholson v. Dyer, 45 Mich. 610 (8 N. W. 515), on this general subject.

⁶ James v. Griffin, 2 Mees. & W. 622.

which he never does, it has been *held* that the vendor could maintain replevin, even against an innocent purchaser, from the vendee for value.¹ But a contrary rule was followed in a case of replevin by a mortgagee who had left the mortgagor in possession with permission to sell.² One who has sold property on an agreement of the purchaser to give a note at four months, which, on request, the purchaser neglected to do for three days, may replevy the property, and no demand is necessary, no title having passed to the purchaser.³ Where plaintiffs contracted to sell property to be paid for by ninety-day note, and property was delivered but defendants refused to give the note or to return the property, claiming the property was not up to contract, *held*, that plaintiffs could maintain replevin, as the conditional sale was not consummated, and that defendants could not hold the property for the performance of the contract.⁴ But where defendant bought property, agreeing to pay in two weeks, and did not do so, *held*, that the title passed, and replevin could not be maintained by the vendor.⁵

§ 257. **Must offer to return notes before suing.** Replevin is strictly an action at law. The right of recovery must exist at the time the action is commenced, and where the vendor has received notes for the purchase price, and desires to rescind the sale for fraud, he must return the notes before he brings replevin; he cannot, as in an equitable action, bring the notes into court and offer to surrender them as the court may direct.⁶ But if the note has been adjudged

¹ Bradshaw v. Warner, 54 Ind. 58; Thomas v. Winters, 12 Ind. 322; Dunbar v. Rowls, 28 Ind. 225; Ballard v. Burgett, 40 N. Y. 314; Hirschorn v. Carnny, 98 Mass. 149; Hodson v. Warner, 60 Ind. 214.

² Carter v. Falely, 67 Ind. 427.

³ Solomon v. Hathaway, 126 Mass. 482.

⁴ Osborn v. Gantz, 60 N. Y. 540.

⁵ Thompson v. Wedge, 50 Wis. 642 (7 N. W. 560).

⁶ Thompson v. Peck, 115 Ind. 512 (18 N. E. 16); Moriarty v. Stofferan, 89 Ill. 528; Deane v. Lockwood, 115 Ill. 490; Parrish v. Thurston, 87 Ind. 437; Haase v. Mitchell, 58 Ind. 213; Home Ins. Co. v. Howard, 111 Ind. 544; Gilbert v. McCorkle, 110 Ind. 215; Powers v. Benedict,

to be void, an offer to return is not necessary.¹ In an action of replevin it is essential that the plaintiff should be entitled to the possession of the property at the time the writ was sued out. Where a party is induced to sell property and take a note of the purchaser, and another, upon false and fraudulent representations as to the amount of the property owned by the security, he may rescind the contract by offering to return the note, but he cannot maintain replevin for the property sold until he does so, and demands the property.² But if he brings the suit without so offering to return note and rescind the sale, but offer to do so before trial, it will not defeat his right to recover, but defendant will be entitled to costs up to that time, and perhaps damages, if he have suffered any.³

§ 258. **Must pay back partial payment received on a rescission.** Where goods are sold by bill of sale to be paid for in installments, the vendor must not only demand payment as agreed, but, in case of default, demand the return of the goods before he can maintain replevin therefor. In such a case the value of the property as fixed by the bill of sale, less the amount of the installments paid on the same by the vendee, is the value to be assessed by the jury, in finding a verdict for the plaintiff; and the interest on such value from the time of the demand is the amount of damages to be assessed for its detention.⁴ Where property was

88 N. Y. 605; *Gould v. Cayuga Co. Nat. Bank*, 86 N. Y. 75; *Id.* 99 N. Y. 333; *Nichols v. Michael*, 23 N. Y. 264; *Wilber v. Flood*, 16 Mich. 40; *Pangborn v. Ruemenapp* (Mich.), 42 N. W. 78.

¹ *Gittings v. Carter*, 49 Iowa, 338.

² *Moriarity v. Stofferan*, 89 Ill. 528; *Buchman v. Harney*, 12 Ill. 336; *Smith v. Doty*, 24 Ill. 163; *Hanchett v. Sorg*, 15 Bradw. (Ill.) 493.

³ *Doane v. Lockwood*, 115 Ill. 490 (4 N. E. 500); *Farwell v. Hanchett*, 120 Ill. 573 (9 N. E. 58). *Weed v. Page*, 7 Wis. 511; *Jennings v. Gage*, 13 Ill. 611; *Nellis v. Bradley*, 1 Sandf. (N. Y.) 560; *Thurston v. Blanchard*, 22 Pick. 20; *Kimball v. Cunningham*, 4 Mass. 502; *Poor v. Woodburn*, 25 Vt. 235; *Voorhees v. Earl*, 2 Hill, 288; *Buchman v. Harney*, 12 Ill. 337; *Ryan v. Brant*, 42 Ill. 79.

⁴ *Arosemena v. Hinckley*, 43 N. Y. Sup. Ct. 43.

sold on part time and \$100 paid cash, if the vendor wishes to rescind the sale for fraud he should make demand and tender back the money received, less the value of the goods disposed of by the vendee, up to the time of the rescission and less also the depreciation of the goods replevied.¹

§ 259. **Need not offer back payments made—Contract—Demand.** Where the sale was on partial payments, the title and right to take possession to remain in vendor, *held*, that on default of a payment he could take possession and maintain replevin therefor without offering back the money already paid. And if for any reason the vendee could recover back the money so paid it must be in a separate action and not in the replevin action.²

§ 260. **Where it is impossible to restore, will not be required.** Where the fraudulent party has so complicated the transaction that it is out of the power of the other to restore, the law only requires him to restore as far as is possible.³

§ 261. **When offer to restore must be made,** the law does not require the party seeking to rescind to surrender the note or other consideration in advance of obtaining the goods sold.⁴ It is sufficient if the offer be made before trial.⁵ But unless the tender back be made before verdict it will be too late, and the defendant may have a new trial.⁶

§ 262. **Sale induced by fraud of vendee.** If A, after refusing to sell goods to B, a broker, personally delivers the

¹ Schoonmaker v. Kelly, 42 Hun. (N. Y.) 299.

² Fairbanks v. Malloy, 16 Bradw. (Ill.) 277. See Moriarity v. Stof-feran, 89 Ill. 528.

³ Masson v. Bovet, 1 Denio, 73.

⁴ Poor v. Woodburn, 25 Vt. 239.

⁵ Matteawan Co. v. Bentley, 13 Barb. 641; Smith v. Doty, 24 Ill. 163; Ryan v. Brant, 42 Ill. 79; Buchman v. Harney, 12 Ill. 337; Voorhees v. Earl, 2 Hill, 288; Kimball v. Cunningham, 4 Mass. 502; Coghill v. Boring, 15 Cal. 217; Thurston v. Blanchard, 22 Pick. 20; Nellis v. Bradley, 1 Sandf. (N. Y.) 560; Jennings v. Gage, 13 Ill. 611; Weed v. Page, 7 Wis. 511; Nichols v. Michael, 23 N. Y. 264.

⁶ Ayers v. Hewett, 19 Me. 286; Manning v. Albee, 11 Allen, 520.

goods to B upon his representation that they are for an undisclosed principal, in good credit, and it turns out that no such principal exists, there is no sale, although the transaction is entered upon A's books as a sale to B, and a bill of parcels of the goods is made to him; and A may maintain replevin for the goods against a *bona fide* pledgee of B.¹ The rule of law is well settled that a sale and delivery of goods procured by fraud passes no title to the fraudulent vendee as between him and the vendor, and the latter may maintain replevin to recover the goods.² Where, before actual delivery, the possession of personal property is taken by the vendee, through the perpetration of a fraud, the vendor may rescind the contract, and replevy his property, and this without repaying or tendering the earnest money advanced by him.³ When a vendee brings replevin for property purchased of an insolvent vendor, against attaching creditors, who attached before he had taken manual possession of the property (steam boilers), the burden is on plaintiff to show that it was a *bona fide* purchase.⁴ A vendor who is induced to part with his property by fraud may rescind the contract of sale and reclaim the property, until, with a knowledge of the fraud, he elects to ratify or confirm the sale, or third persons acting upon the apparent ownership of the property by the fraudulent vendee have acquired rights therein *bona fide*, and for a valuable consideration. Execution creditors would not acquire such a title by levy.⁵

§ 263. **A vendor may reclaim property obtained from him by fraud, and may maintain replevin.** This rule does

¹ Radliff v. Dollinger, 141 Mass. 1.

² Delin v. Stohl, 2 N. Y. Civ. Pro. R. 222; Ash v. Putnam, 1 Hill, 302; Hunter v. Hudson, &c., 493; Nichols v. Michael, 23 N. Y. 264; Hammond v. Lynes, 21 Fla. 118; Thurston v. Blanchard, 22 Pick. 18; Buffington v. Gerrich, 15 Mass. 156; 5 Waits, A. & D. 459; Bigelow on Fraud, 401-3; Hall v. Gillmore, 40 Me. 578.

³ Bush v. Bender, 113 Pa. 94 (4 A. 213).

⁴ Taylor v. Richardson, 4 Houst. (Del.) 300.

⁵ Williamson v. N. J. S. R. R. Co. 29 N. J. Eq. 311.

not, of course, extend to cases where the property has passed into the hands of a *bona fide* purchaser.¹

§ 264. A contract of exchange, obtained by fraud, may be treated as void, and replevin brought for the property.² But where a plaintiff traded his wagon for another, which is taken from him, in the absence of fraud, he cannot maintain replevin for the wagon so traded.³

§ 265. **Fraudulent purchaser takes a title voidable at the election of the defrauded vendor.** The purchaser who by fraud purchases goods has no protection in law in such case. The seller may affirm the sale and sue for the price, or he may disaffirm it and replevy the goods, or he may proceed criminally.⁴ A person obtaining goods by fraudulent pre-

¹ *Parish v. Thurston*, 87 Ind. 437. On this general subject see *Buffington v. Gerrish*, 15 Mass. 156 (8 Am. Dec. 97); *Thurston v. Blanchard*, 22 Pick. 18 (33 Am. Dec. 700); *Story on Sales*, § 172; *Brower v. Goodyer*, 88 Ind. 572; *Donaldson v. Farwell*, 93 N. S. 631; *Byrd v. Hall*, 2 Keyes, 647; *Johnson v. Monell*, 2 Keyes, 655; *Noble v. Adams*, 7 Taunt. 59; *Kilby v. Wilson, Ryan & M.* 178; *Bristol v. Wilsmore*, 1 Barn. & C. 513; *Stewart v. Emerson*, 52 N. H. 301; *Benjamin on Sales*, § 440, note and citations; *Henshaw v. Bryant*, 4 Scam. 97; *Patton v. Campbell*, 70 Ill. 72; *Donaldson v. Farwell*, 5 Bissell, 451; *Seligman v. Kalkman*, 8 Cal. 207; *Bedault v. Wales*, 19 Mo. 36; *Dow v. Sanborn*, 3 Allen, 181; *O'Donald v. Constant*, 82 Ind. 212; 2 *Pomeroy*, Eq. § 906; *Shouler's Per. Prop.* § 511-569; *Bigelow's Law of Fraud*, p. 77-412.

² *Nolan v. Jones*, 53 Iowa, 387 (5 N. W. 572).

³ *Marson v. Plummer*, 64 Me. 315.

⁴ *Sargent v. Sturm*, 23 Cal. 359; *Nichols v. Pinner*, 18 N. Y. 295; *Ayres v. Hewitt*, 19 Me. 281; *Hunter v. Hudson R. I. Co.*, 20 Barb. 494; *Nichols v. Michael*, 23 N. Y. 266; *Rowley v. Bigelow*, 12 Pick. 307; *Lloyd v. Brewster*, 4 Paige, 541; *Gray v. St. Johns*, 35 Ill. 239; *Titcomb v. Wood*, 38 Me. 563; *Mackinley v. McGregor*, 3 Whart. (Pa.) 368; *Bowen v. Schuler*, 41 Ill. 193; *Smith v. Dennis*, 6 Pick. 262; *Marston v. Baldwin*, 17 Mass. 606; *Hussey v. Thornton*, 4 Mass. 405; *Hill v. Freeman*, 3 Cush. 259; *Van Cleef v. Fleet*, 15 Johns. 149; *Kilby v. Wilson*, 1 R. & Moody, 178; *Bristol v. Wilsmore*, 1 R. & C. 514; *Seaver v. Dingley*, 4 Gr. (Me.) 307; *Hall v. Gilmore*, 40 Me. 581; *Hall v. Naylor*, 18 N. Y. 588; *Cary v. Hotailing*, 1 Hill, 311; *Matteawan Co. v. Bentley*, 13 Barb. 641; *Ash v. Putnam*, 1 Hill, 302; *Olmstead v. Hotailing*, 1 Hill, 317; *Acker v. Campbell*, 23 Wend. 372; *Abbotts v. Barry* (2 Brad. & Bing.), 6 E. C. L. 370; *Browning v. Bancroft*, 8 Met. 278; *Coghill v.*

tenses is guilty of a tortious taking, and no demand for possession is necessary to enable the person defrauded to maintain replevin for them unless they have passed to a third person, holding them *bona fide* for a valuable consideration, without notice.¹ In such a case the commencement of a suit in replevin is all the notice required of the election of the vendor to rescind.² If, however, the vendor has received a part of the consideration, he must first offer to return it and place the vendee in *statu quo* before he can replevy; but if he do not do this, and bring the action and prove the fraud, he will be permitted to tender back the consideration received, and maintain the action, but will be taxed with costs up to the time of making the tender.³ It is well settled both that the purchaser cannot avoid the sale on the ground of his own fraud, and that the seller may avoid it as long as the property is in the hands of the purchaser.⁴ But if the owner stand by and see his fraudulent vendee sell them to a third

Boring, 15 Cal. 217; Noble v. Adams, 7 Taunt. 59; Bigelow's Law of Fraud, 77-412.

¹ Goldschmidt v. Berry, 18 Bradw. (Ill.) 276. See Bussing v. Rice, 2 Cush. 48; Thurston v. Blanchard, 22 Pick. 18; Buffington v. Gerrish, 15 Mass. 156; Butters v. Haughwout, 42 Ill. 18; Ryan v. Brant, 42 Ill. 79; Bruner v. Dyball, 42 Ill. 34.

² Summer v. Waugh, 56 Ill. 531; Smith v. Smith, 19 Ill. 349; Herington v. Hubbard, 1 Scam. 569.

³ Farwell v. Hanchett, 19 Bradw. (Ill.) 620.

⁴ Weed v. Page, 7 Wis. 503; Manning v. Albee, 14, Allen, 8; Bristol v. Wilsmore, 1 B. & Cress. 514; Stephenson v. Hart, 4 Bing. 476; Caldwell v. Bartlett, 3 Duer. 341; Titcomb v. Wood, 38 Me. 561; Jennings v. Gage, 13 Ill. 610; Williams v. Given, 6 Gratt. 268; Keyser v. Harbeck, 3 Duer. 373; Allison v. Matthieu, 3 Johns. 235; Malcom v. Lovereidge, 13 Barb. 372; Andrew v. Dieterick, 14 Wend. 32; Welker v. Wolverkuehler, 49 Mo. 36. The few cases which hold a contrary rule—as McCarty v. Vickery, 12 John. 348; Nash v. Mosher, 19 Wend. 431; Marshall v. Davis, 1 Wend. 109—have been overruled or doubted—see Butler v. Collins, 12 Cal. 457; Ash v. Putnam, 1 Hill, 307; Barrell v. Warren, 3 Hill, 348; Olmstead v. Hotailing, 1 Hill, 317; or have been decided on different points, as in Harper v. Baker, 3 T. B. Mon. (Ky.) 421, where a question of trespass was involved; or Trapnall v. Hattier, 1 Eng. (Ark.) 23, where the rights of an innocent purchaser were involved so that they are apparent exceptions only.

party without objection, he is estopped to maintain replevin against the purchaser.¹

§ 266. It is not material when false representations were made, so they procured the consent of vendor — **Meaning of consent.** By the consent of the vendor to the sale is meant something more than the mere consenting to the change of possession of the property sold. It must be a conscious act, not influenced by false or fraudulent statements of the vendee.² And the law does not measure degrees of fraud. Whether or not it be sufficient upon which to base a criminal charge, is no matter. If the fraud induced the sale, it is sufficient.³ If made before the sale, and the fraudulent representations are in fact the cause of the sale, it is sufficient ground for rescinding it by the vendor.⁴

§ 267. **What circumstances justify a rescission.** The seller of goods on credit cannot rescind the contract of sale, and maintain replevin for the goods, upon proof that the purchaser had, at the time of the purchase, no reasonable expectation of paying for them. The proof must raise the presumption that the vendee intended at the time of the purchase never to pay for the goods.⁵

§ 268. **When no questions are asked,** no false pretenses, no artifice resorted to, silence is not fraud; but concealment of insolvency, with no reasonable expectation of paying, renders a sale fraudulent, and a vendor is entitled to possession as against the vendee or his voluntary assignee.⁶

¹ *Skinner v. Stouse*, 4 Mo. 93; *Thompson v. Blanchard*, 4 N. Y. 303.

² *Seaver v. Dingley*, 4 Gr. (Me.) 307; *Thurston v. Blanchard*, 22 Pick. 20; *Hall v. Gilmore*, 40 Me. 581; *Gray v. St. John*, 35 Ill. 239.

³ *Irving v. Motly*, 7 Bing. 543; *Poor v. Woodburn*, 25 Vt. 234; *Acker v. Campbell*, 23 Wend. 373.

⁴ *Bowen v. Schuler*, 41 Ill. 194; *Allison v. Matthieu*, 3 Johns. 235.

⁵ *Manheimer v. Harrington*, 20 Mo. App. 297; *Bidault v. Wales*, 19 Mo. 36; *Fox v. Webster*, 46 Mo. 181; *Thomas v. Freligh*, 9 Mo. App. 151.

⁶ *Davis v. Stewart*, 3 McCrary, 174 (8 Fed. 803). See *Thompson v. Rose*, 16 Conn. 71; *Johnson v. Monell*, 2 Keyes, 655; *Powell v. Bradlee*, 9 Gill. & J. 220; *Talcott v. Henderson*, 31 Ohio St. 162-52 and note;

§ 269. . **Payment in counterfeit money**, believed by the vendor to be genuine, is such a fraud that no title passes, and vendor may recover possession.¹

§ 270. **Where an infant pleads his minority** to escape payment of the purchase price, the seller may rescind the sale and replevy the goods.²

§ 271. **Non-payment no ground of rescission.** In the absence of deceit or fraud on the part of the purchaser, simple non-payment for goods bought on credit is no ground for rescission of the contract. Such a case is one of the natural contingencies of any business.³

§ 272. **Where an insolvent honestly, though hopelessly,** endeavors to go on in business, and no questions are asked him by the seller, his failure to disclose his insolvency is no fraud, and no ground for replevin.⁴ While a man is really struggling against adversity, with an honest intent to retrieve his fortunes, the law will not declare him incapable of purchasing goods on a credit, although he does not disclose to the vendor the extent of his embarrassment. In such a case there is wanting that essential ingredient in fraud, a design never to pay.⁵ If a purchaser honestly believe himself to be solvent, but is not, the sale cannot be rescinded.⁶

§ 273. **Completion of payment stopped by garnishment no ground for rescission.** Where a party turned over certain notes and mortgages, and while the purchase price was

Donaldson v. Farewell, 93 U. S. 631; Nichols v. Pinnen, 18 N. Y. 295; Conyers v. Ennis, 2 Mason, 237; Powell v. Bradlee, 9 Gill. & J. (Md.) 220.

¹ Williams v. Given, 6 Gratt. (Va.) 268.

² Badger v. Phinney, 15 Mass. 359.

³ McNail v. Ziegler, 68 Ill. 224.

⁴ Nichols v. Pinnen, 18 N. Y. 295; Conyers v. Ennis, 2 Mason, 237; Powell v. Bradlee, 9 Gill. & J. (Md.) 220.

⁵ Reticker v. Wachtel, 26 Ill. App. 33. No false statements were made in this case. Patten v. Campbell, 70 Ill. 72; Morril v. Corbin, 13 Ill. App. 81; Catlin v. Warren, 16 Ill. App. 418; Preston v. Spaulding, 18 Ill. App. 341.

⁶ Greaner v. Mullen, 15 Pa. St. 206.

being turned over to him, and he had received a part of it, and the further payment was arrested by garnishment, he cannot bring action for the possession of the notes and mortgage.¹

§ 274. **Failure of vendee may justify a rescission.** Where a vendee has got possession of the property, but has not fulfilled his contract by giving note, and fails, vendor may maintain replevin.² Where a conditional sale has been made, and the property is levied on, for debts of vendee, in vendee's hands, vendor may bring replevin.³

§ 275. **Must exercise his right of rescission promptly.** It is but justice to all parties that, if he would undo what he has done, he should act promptly on the discovery of the fraud. It is also required of him that he exercise diligence in discovering the fraud, as well as in rescinding the sale. When the plaintiff claimed that a horse had been stolen from him by R., in a suit against one who claimed to be a *bona fide* purchaser from R., the fact that the plaintiff had neglected for several years to proceed against R., who was responsible, and who lived in the same county, was held proper a defense.⁴

§ 276. **Rule where possession by consent, but based on fraud.** Where the *title* is obtained by fraud, and the possession accompanies it by the consent of the owner, the writ does not lie, where one gets the possession alone by fraud, violence, etc.; or where the property disappears without the owner's consent and is taken possession of by the party complained against, it will lie. A tender back of whatsoever may have been given in exchange by the complaining party will not make that possession, which simply followed title, such possession as will support this remedy.⁵

¹ *Morseman v. McKenley*, 67 Ga. 391.

² *Sutro v. Hoile*, 2 Neb. 186.

³ *Aultman v. Mallory*, 5 Neb. 178.

⁴ *Welker v. Wolverkuehler*, 49 Mo. 35; *Furniss v. Hone*, 8 Wend. 248; *MacKinley v. MacGregor*, 3 Whart. (Pa.) 368; *Coghill v. Boring*, 15 Cal. 213; *Smith v. Field*, 5 Term Rep. 403.

⁵ *Welborn v. Shirly*, 65 Ga. 695; *Amos v. Dougherty*, 65 Ga. 612.

§ 277. **What acts constitute a return and rescission.** To make a valid rescission to support replevin, the property received in exchange should be tendered back at the place it was when received, if practicable, and the defendant should be given to understand that the property is returned for that purpose, and that the intention of the plaintiff is to thereby rescind the sale. Thus, where plaintiff and defendant had traded horses, and plaintiff claimed fraud and took defendant's horse and left it in defendant's yard, without saying anything to him, and replevied his own, this was *held* not to be a proper return. But I think the law as laid down in this case will hardly be followed generally by the courts.¹

§ 278. **Effect and remedy on rescission of sale by vendor for fraud by vendee—Proof.** Where a sale of goods on a credit is rescinded by the vendor for fraud in the purchase, the contract is treated as a nullity, and the vendee is treated not as a purchaser, but as a person who has tortiously obtained possession of the goods, and the proper action in such case is replevin, but the contract cannot be rescinded as to part and affirmed as to the residue.² Where a vendor rescinds a sale for fraud and brings replevin, he must prove that the representations were made by the vendee, that they were false when made, that the vendee knew them to be false, that they were such as would deceive a prudent

In this case the plaintiff and defendant traded horses. Plaintiff claimed fraud, on the discovery of which he took back the horse he had received and claimed his own, but was not allowed to recover on the narrow ground that, though he was deceived into making the trade, he voluntarily parted with the possession of the property; therefore, defendant's possession was not wrongful. But the Georgia statute allows the action only when the taking is wrongful. See *Trotti v. Wyly*, 77 Ga. 684.

¹ *Thayer v. Turner*, 8 Met. 553; *Perley v. Balch*, 23 Pick. 283. See *Conner v. Henderson*, 15 Mass. 320; *Kimball v. Cunningham*, 4 Mass. 502; *Thurston v. Blanchard*, 22 Pick. 18.

² *Kellogg v. Turpie*, 93 Ill. 265; *Read v. Hutchison*, 3 Camp. 351; *Ferguson v. Carrington*, 9 B. & Cr. 59; *Strutt v. Smith*, 1 C. M. & R. 311; *Selway v. Fogg*, 5 M. & W. 83; *Allen v. Ford*, 19 Pick. 217; *Bowen v. Schuler*, 41 Ill. 193; *Ryan v. Brant*, 42 Ill. 78; *King v. Mason*, 42 Ill. 223. See *Schuler's Pers. Prop.* § 511-569.

man, that they were believed by vendor, and that they induced him to part with his property.¹

§ 279. **Third persons, how affected.** A defrauded vendor of goods may reclaim them from the fraudulent vendee, or from any person to whom he has conveyed them without consideration.² But to maintain replevin he must act at once upon the discovery of the fraud, and it is a necessary condition precedent to bringing the action of replevin that he return the property or purchase money received from defendant to him, and that he first place him in the same position he was before the sale or trade.³

§ 280. **May bring replevin and action for the value at same time.** When a vendor has disaffirmed a sale on the ground of fraud, he may reclaim by an action of replevin for such of the goods as are within reach, and maintain an action at law against the vendee for the value of those disposed of, at the same time.⁴

§ 281. **But cannot prove under bankrupt law and then replevy.** A creditor who has proved his claim against an estate in bankruptcy, as for goods sold and delivered to the bankrupt, cannot maintain an action of replevin for the goods. To prove his claim, he must affirm the sale; to replevy the property, he must disaffirm the sale. The two acts are inconsistent, and cannot be allowed.⁵

§ 282. **May claim under assignment and replevy at the same time.** Where a good part of goods sold are replevied

¹ Gregory v. Schoenell, 55 Ind. 101.

² Steinwender v. Outley, 5 Mo. App. 588; Schwabacher v. Kane, 13 Mo. App. 126; Williams v. Given, 6 Gratt. (Va.) 268.

³ Cahn v. Reid, 18 Mo. App. 115; Pearsol v. Chapin, 44 Pa. St. 9; Melton v. Smith, 65 Mo. 315; Wilbur v. Flood, 16 Mich. 40; Thayer v. Turner, 8 Met. 550; Wood v. Page, 7 Wis. 511; Moriarty v. Stafferan, 89 Ill. 528; Sanborn v. Osgood, 16 N. H. 112; Weeks v. Robie, 42 N. H. 316; White S. M. Co. v. McBride, 27 Mo. App. 470.

⁴ Hersey v. Benedict, 15 Hun. (N. Y.) 282.

⁵ Ormsby v. Dearborn, 116 Mass. 386; Cook v. Farrington, 104 Mass. 212; Bassett v. Brown, 105 Mass. 551; Seavey v. Potter, 121 Mass. 291.

by the vendor on the ground that the vendee purchased them, intending not to pay for them, a subsequent general assignment by the vendee and a presentation and disallowance of a claim for the balance of the debt before the assignee is not a bar to a recovery in the replevin suit.¹

§ 283. **Where sold on execution vs. buyer, cannot be replevied.** Where goods are bought by fraud and false pretenses, and are afterwards sold on execution against the buyer, to a *bona fide* purchaser, the original vendor of the goods cannot maintain replevin therefor against such purchaser.²

§ 284. **Will not lie against purchaser in good faith.** An action of replevin will not lie by the owner of property against one who purchased the same in good faith for value without notice of any defect in the title of the seller, supposing him to be the true owner, without a demand.³ Replevin lies to recover from even a *bona fide* purchaser property which had been taken by the latter's vendor without the consent or authority of the owner.⁴ For a contrary view.⁵ Replevin will lie against the purchaser of a chattel from one who has tortiously obtained possession thereof, notwithstanding that the vendor may have been pecuniarily responsible, and the plaintiff nevertheless made no effort to hold him to accountability, where it is not shown that the purchaser was ignorant of the wrongful nature of the taking, or that he was in fact misled by the acts or neglect of plaintiff.⁶

¹ Florence Soap Co. v. Jacobus, 16 Mo. App. 560.

² Claflin v. Cottman, 77 Ind. 58.

³ Torian v. McClure, 83 Ind. 310; Wood v. Cohen, 6 Ind. 455; Sherry v. Picken, 10 Ind. 375; Conner v. Comstock, 17 Ind. 90. See Mitchell v. Worden, 20 Barb. 253; Nichols v. Pinner, 18 N. Y. 295; Malcom v. Loveridge, 13 Barb. 372; Jennings v. Gage, 13 Ill. 611; O. & M. R. R. Co. v. Kerr, 49 Ill. 458; Shufeldt v. Pease, 16 Wis. 659.

⁴ Parish v. Morey, 40 Mich. 417.

⁵ Butters v. Haughwout, 42 Ill. 18; Krauert v. Simon, 65 Ill. 344. Brundage v. Camp, 21 Ill. 330; Burton v. Curyea, 40 Ill. 320; Patton v. Campbell, 70 Ill. 72; Powell v. Bradlee, 9 Gill. & J. (Md.) 220.

⁶ Welker v. Wolverkuehler, 49 Mo. 35. In this case the vendor took the horse without any show of right from plaintiff, and held it for a number of years, though they lived near together. When it was purchased by

§ 285. **Goods obtained by fraud and levied on for debts of the vendee may be replevied by the true owner,** the reason being that the only consideration in these cases is the extinguishment of a debt which can be revived by setting aside or rescinding the transfer, and the party levying is in no worse plight than he was before.¹ In such cases the creditor's only right to the goods is founded upon the fact that they belonged to their debtor, but his title having been acquired by fraud and misrepresentation, and having been rescinded by the first and true owner, the attaching creditor's right falls to the ground.²

§ 286. **Goods obtained by fraud and used to pay a pre-existing debt may be replevied by the true owner.** Where goods obtained by fraud are turned over to pay a pre-existing debt of the vendee, either by actual sale or by pledge, such second vendee is not considered as an innocent purchaser for value, as, if he is compelled to surrender the goods to the true owner, he is in no worse position than before. In such cases it is well settled that the true owner may retake his property.³

§ 287. **Conditional sale, vendee can sell his interest.** Where, by the terms of a conditional sale of oxen, the vendee was to keep them without cost to the vendor, and return them in two years if not paid for, the vendor cannot maintain replevin for the cattle against a purchaser of the vendee's *interest* before the expiration of the two years.⁴ Where a vendee in possession of land under articles of sale removes

defendant, plaintiff brought this action, never having attempted in any way to get satisfaction out of the vendor.

¹ Durrell v. Haley, 1 Paige, 492; Adams v. Smith, 5 Cow. 280; Wiggin v. Day, 9 Gray (Mass.), 97; Farley v. Lincoln, 51 N. H. 577.

² Buffington v. Gerrish, 15 Mass. 158.

³ Sargent v. Sturm, 23 Cal. 360; Somes v. Brewer, 2 Pick. 184; Rowley v. Bigelow, 12 Pick. 307; Lloyd v. Brewster, 4 Paige, 537; Root v. French, 13 Wend. 570; Durrell v. Haley, 1 Paige, 492; Coddington v. Bay, 20 Johns. 637; Butters v. Haughwout, 42 Ill. 18; Parker v. Patrick, 5 D. & E. 102; Farley v. Lincoln, 51 N. H. 577.

⁴ Nutting v. Nutting, 63 N. H. 221.

and sells a house from the land, the vendor, having no right of possession, cannot maintain replevin for the house against the purchaser thereof, though he could recover the value from the purchaser if he had knowledge of the facts.¹

§ 288. **What is wrongful detention.** Where plaintiff establishes that he is the owner, and entitled to the immediate possession of the same, a wrongful detention by defendant is established by proof that he held the property on an attachment against a third party, and refused to give it up on demand.² Replevin may be brought for cattle taken up and condemned under the contagious disease law, and the finding that they were diseased, or had been exposed to contagion, in that *ex parte* proceeding, is not conclusive, but may be retried in replevin.³ Replevin may be brought for animals distrained to test the legality of the law.⁴ Where the pound has been broken open and the animals have either been driven away or have escaped, and are afterwards found outside the village limits, the poundmaster may bring replevin.⁵ It will not lie against an officer who has made an excessive levy for the excess of goods over a sufficient levy.⁶ Replevin lies in all cases where there has been a wrongful taking or detention of personal property, and the spirit of the law contemplates a full and complete remedy for the wrong by a recovery of the property and compensation of the injury.⁷ Replevin lies against a sheriff for property seized by him under an execution, notwithstanding the plaintiff in execution has delivered to the sheriff a bond of indemnity.⁸ Replevin will not lie against a sheriff for property held by him in another replevin action commenced by the same plaintiff for the

¹ Weed v. Hall, 101 Pa. 592.

² Kelley v. Burchfield, 27 Kan. 700.

³ Verner v. Bosworth, 28 Kan. 670.

⁴ Cook v. Bassett, 23 Mich. 113.

⁵ Grover v. Huckins, 26 Mich. 476.

⁶ Thompson v. Jones, 84 Ala. 279 (4 So. 169); Sexey v. Adkinson, 40 Cal. 408.

⁷ Burrage v. Melson, 48 Miss. 237.

⁸ Saunders v. Jordan, 54 Miss. 428; Swain v. Alcorn, 50 Miss. 320.

same property. In such case the officer holds the property as the agent of the plaintiff, and, if guilty of any breach of his duty, is liable to the court in the first action, which is still pending.¹ The ordinary remedies of a party against one who has wrongfully converted and wrongfully detains his chattels or *choses in action* is by an action of trover or replevin. But in peculiar cases, where from the nature of the case or of the property detained neither of such actions will give proper or sufficient relief, an equitable action may be instituted for the specific delivery of the property, and judgment in such an action may be enforced by punishment for contempt, which cannot be done in a replevin action.²

§ 289. **Does not lie by vendee to enforce contract of sale.** The fact that a vendor has not performed his contract to sell property, and where the purchaser has never had possession, nor had the right to possession, will not authorize a suit in replevin. The vendee's remedy is by action to enforce the contract or damages for its breach.³ Will not lie to enforce an unexecuted contract.⁴ A vendee of pig iron not yet separated or pointed out cannot maintain replevin against an officer who levies on execution against the vendor upon a part of the pig iron piled on the vendee's wharf.⁵ It will not lie to recover damages for a mere breach of contract in not delivering property. There must be an actual tortious taking or detention.⁶ But it may be brought where it is understood and intended that the title to the property should pass without any further act of the parties.⁷

¹ Pollard v. Stovall, 60 Miss. 266.

² Hammond v. Morgan, 101 N. Y. 179 (4 N. E. 328). This was an equitable action, brought to compel the return of a written assignment of certain letters patent. See also Pomeroy's Eq. Jur. § 177, 1402.

³ Haverstick v. Fergus, 71 Ill. 105; Low v. Freeman, 12 Ill. 467.

⁴ Urdike v. Henry, 14 Ill. 378; Beckwith v. Phillips, 15 Wis. 223; Boutell v. Waren, 62 Mo. 350; Mead v. Johnson, 54 Conn. 317 (7 Atl. 718); Sneathen v. Grubbs, 88 Pa. 147.

⁵ First National Bank v. Crowley, 24 Mich. 492.

⁶ Mead v. Johnson, 54 Conn. 317 (7 Atl. 718).

⁷ Rhea v. Rines, 21 Ill. 526.

CHAPTER XII.

RIGHT OF REPLEVIN BY AND FROM AN ASSIGNEE FOR BENEFIT OF CREDITORS.

	Section.		Section.
An assignee is not a purchaser for value	290	May replevy property retaken by the assignor	295
An assignee represents the assignor	291	Replevy lies, by the seller, against the assignee of a fraudulent purchaser	296
Need not allege his official character in petition	292	Rights of a purchaser—Voluntary assignment—Title of assignee	297
His right depends upon his complying with the law	293	Assignee's suit subject to the same defenses as any other suit	298
By assignor against assignee for exempt property	294		

§ 290. **An assignee is not a purchaser for value.** An assignee takes the thing assigned subject to all the equities to which the original party was subject.¹ He is not a purchaser for value, and at most his rights are not greater than an attachment or judgment creditor, and he acquires no title that will hold against the true owner. Where, therefore, the circumstances are such that the vendor could have maintained replevin for the property against his vendee, he can maintain replevin against his vendee's assignee.²

§ 291. **An assignee represents the assignor.** A voluntary assignee for the benefit of creditors has no greater title than his assignor to the latter's property, and cannot question the validity of a recorded mortgage made by him by

¹ Lord Mansfield in *Peacock v. Rhodes*, Dougl. 636.

² *Farley v. Lincoln*, 51 N. H. 577; *Lood v. Green*, 15 M. & W. 216; *Bristol v. Wilshire*, 1 B. & C. 514; *Van Cleef v. Fleet*, 15 Johns. 147; *Mowry v. Walsh*, 8 Cow. 238; *Root v. French*, 13 Wend. 575; *Buffington v. Gerrish*, 15 Mass. 156.

suing in replevin for the chattels mortgaged. It would be different with an assignee in bankruptcy, or an involuntary assignment, who would represent the creditors rather than the assignor.¹ Is a trustee for the creditors.² An assignee for the benefit of creditors can not maintain replevin for property fraudulently conveyed by his assignor before the assignment, and if he surreptitiously obtain possession he cannot hold such possession against the grantee in the fraudulent conveyance. The proper remedy is in equity.³ An assignee, under a voluntary assignment, cannot replevy personal property from an officer holding the same on execution against the assignor, levied prior to the recording of the assignment; his title passes by the recording of the assignment.⁴

§ 292. **Need not allege his official character in petition.** Where an assignee brings replevin for part of the assigned estate, he need not allege that he is the owner of the goods "as assignee." He may aver his title generally, and prove such facts as show a general or special property and right of possession.⁵ Replevin lies at the suit of an assignee of a debtor against creditors who have attached the property covered by the assignment after the assignment is executed, but before the assignee has taken possession.⁶

§ 293. **His right depends upon his complying with the**

¹ *Wakeman v. Barrows*, 41 Mich. 363.

² *Lam Yip v. Ching Sing*, 5 Hawaiian, 589.

³ *Charles Baumbach Co. v. Miller*, 67 Wis. 449 (30 N. W. 850). See *Kloeckner v. Bergstrom*, Id. 197 (Id. 118); *Frost v. Citizens National Bank*, 68 Wis. 234 (32 N. W. 110). But in many of the states, as in Nebraska, conveyances made within a certain time prior to the assignment are void, unless for value. The remedy, though, would probably be in equity in most cases, though, in such a case, if the property so fraudulently conveyed can be found, it is difficult to see why replevin would not lie by the assignee. Statutes providing for voluntary assignments usually provide that the assignee shall bring suit for property conveyed away in fraud of general creditors within a limited time prior to the assignment.

⁴ *Forkner v. Shafer*, 56 Ind. 120. See *Wells v. Lamb*, 18 Neb. 352 (24 N. W. 682); Id. 19 Neb. 355 (27 N. W. 229).

⁵ *Krug v. McGilliard*, 76 Ind. 28.

⁶ *Wells v. Lamb*, 18 Neb. 352 (24 N. W. 682).

law. Property vests in an assignee upon the execution and delivery of the deed of assignment, and cannot be defeated by an execution coming to the hands of an officer after the delivery of the deed and before filing of bond or schedule, and replevin may be maintained by an assignee for goods taken by an officer under such circumstances if he file his schedule and give bond as required by statute.¹ But if he neglect to so file his bond and schedule, he has no right of possession, and cannot maintain the action.²

§ 294. **By assignor against assignee for exempt property.** An assignment by an insolvent of all his real and personal property, generally, does not pass to the assignee a crop growing at the time of the assignment, on premises constituting a homestead, and the assignor may maintain replevin therefor when seized by the assignee on order of the county court after it was harvested.³

§ 295. **May replevy property retaken by the assignor.** An assignee for the benefit of creditors is the general owner of the assigned goods until his trust is fully performed, and may maintain replevin against the assignor if he retake the assigned property.⁴

§ 296. **Replevin lies by the seller against the assignee of a fraudulent purchaser.** The same rule holds in case of a voluntary assignment for the benefit of creditors. The assignee can take no higher right to the property than his assignor had. The fact that in assuming dominion over the property of the assigned estate he acted in good faith makes it none the less an invasion of plaintiff's rights.⁵

§ 297. **Rights of a purchaser—Voluntary assignment—Title of assignee.** If, in making the selection of the lum-

¹ Clayton v. Johnson, 36 Ark. 406.

² Thatcher v. Franklin, 37 Ark. 64.

³ Dascey v. Harris, 65 Cal. 357 (4 Pac. 204).

⁴ Rodman v. Nathan, 45 Mich. 607 (8 N. W. 562).

⁵ Barrett v. Warren, 3 Hill, 350; Poor v. Woodburn, 25 Vt. 240. See Thayer v. Turner, 8 Met. 550; Farley v. Lincoln, 51 N. H. 579. See Hilliard on Torts, II., 143.

ber according to the contract, the vendor sets apart more than is called for by the agreement, and notifies the vendee that it is so set apart and subject to his order, there is a good delivery, and the title passes as to the quantity purchased, and the vendee has the right to take that much and refuse the balance; and if, before the property has been removed by the purchaser, but after it has been ordered shipped, the vendor makes an assignment of all his property for the benefit of creditors, the assignee acquires no title to such property, and the purchaser may maintain replevin.¹ An action of replevin to recover possession by virtue of a deed of trust, the condition of which is broken, must be brought in the name of the trustee who has the legal title, and not in the name of the beneficiaries.²

§ 298. **Assignee's suit subject to the same defenses as any other plaintiff.** A replevin suit brought by a general assignee is subject to the same rules as those governing similar suits brought by any other party; and as the law entitles any other defendant in replevin to litigate not merely the right of possession, but the right of property, the assignee adopting that form of action must be held to have adopted it with all its incidents.³

¹ *Martz v. Putnam*, 117 Ind. 392 (20 N. E. 270).

² *Garrett v. Carlton*, 65 Miss. 188 (3 So. 376); *Pollard v. Thomas*, 61 Miss. 152. See *Davis v. Scott*, (26 Neb. —) 43 N. W. 407.

³ *Boyden v. Frank*, 20 Bradw. (Ill.) 169.

CHAPTER XIII.

GOODS IN CUSTODY OF THE LAW.

	Section.		Section.
Goods in custody of law—Old rule—Contempt	299	Property seized under an unconstitutional law	313
Modern rule—Not so strict	300	The writ must be lawfully executed	314
A stranger to the writ of seizure may replevin	301	Lies for powder condemned by city officers	315
The same	302	Liquors seized under a statute forbidding their sale cannot be replevied	316
A purchaser of property so taken is not protected from replevin	303	Property seized by special officers of the law cannot be replevied	317
But where one's goods have been wrongfully seized by an officer and the owner thereafter acquires peaceful possession, he is protected therein	304	Property seized by a revenue collector cannot	318
Mere irregularities in the taking insufficient	305	An assignee in bankruptcy is only protected when he acts strictly within the scope of his duties and authority	319
Exempt property may be replevied	306	Receivers—Comity of states—Will respect officers of sister states	320
The same—Construction—Costs	307	Replevin lies against a receiver where he takes the wrong property	321
Exempt property may be replevied in any court having jurisdiction, notwithstanding the statute provides a special proceeding	308	The legislature may bar the right by replevin	322
Attached property may be replevied	309	Property held by special order of court—Fine	323
But the action cannot be brought by the attachment plaintiff	310	Property held by U. S. marshal cannot be replevied in state court	324
But if he pay claim of plaintiff, may then replevy from the officer	311	But where the marshal has taken the wrong person's goods, or is proceeding illegally, it will lie	325
Where the process of seizure is void or the court had no jurisdiction	312	Replevin for property illegally seized may be brought in	

	Section.		Section.
any court having jurisdiction	326	any court of competent jurisdiction	329
May be brought where property is or where defendant resides	327	Replevin against attaching officer—Where brought	330
Removal of the property does not affect the jurisdiction	328	May be removed from state to federal court	331
The action may be brought in		When an execution defendant can replevy	332

§ 299. **Goods in custody of law—Old rule—Contempt.** At common law, property in the custody of an officer, under a valid, legal process, could not be the subject of replevin.¹ But in order to exempt property from seizure under a writ of replevin, in such a case, it must be held by a valid process, and the rule does not apply if the law under which the first process issued is unconstitutional.² And if it is apparent on the face of the process that it was issued without jurisdiction, it would not protect the goods taken thereon from a writ of replevin.³ Goods in custody of the law, or held by an officer, or by any legal process, are not ordinarily the subject of replevin. Any attempt to interfere with them was formerly regarded as a contempt, and punished severely.⁴ It was formerly held that the re-capture by

¹ *Smith v. Huntington*, 3 N. H. 76; *Perry v. Richardson*, 9 Gray (Mass.), 216; *Gardner v. Campbell*, 15 Johns. (N. Y.) 401; *Pott v. Oldwine*, 7 Watts (Pa.), 173; *Grist v. Cole*, 2 N. & M. (S. C.) 456; *Griffith v. Smith*, 22 Wis. 646; *Rayford v. Hyde*, 36 Ga. 93; *Goodrich v. Fritz*, 4 Ark. 525; *Freeman v. Howe*, 24 How. (U. S.) 450; *Carroll v. Hussey* 9 Ired. (N. C. L.) 89; *Lathrop v. Cook*, 14 Me. 414.

² *Cooley v. Davis*, 34 Iowa, 128.

³ *Wood v. Oser*, 25 N. Y. 348.

⁴ *1 Chitty Pl.* 164; *Phillips v. Walker*, 3 J. J. Marsh (Ky.), 124; *Phillips v. Harris*, 3 J. J. Marsh, 123; *Funk v. Israel*, 5 Iowa, 450; *Cooley v. Davis*, 34 Iowa, 128; *Powell v. Bradlee*, 9 Gill & J. (Md.) 220; *Hagan v. Deuell*, 24 Ark. 216; *Goodrich v. Fritz*, 4 Ark. 525; *Allen v. Staples*, 6 Gray (Mass.), 493; *Beer v. Wuerpul*, 24 Ark. 273; *Shearick v. Huber*, 6 Binn. 4; *Morgan v. Craig*, (Hardin) Ky. 101; *Hall v. Tuttle*, 2 Wend. 478; *McLeod v. Oates*, 8 Ired. (N. C.) 387; *Jenner v. Joliffe*, 9 Johns. 384; *Buckley v. Buckley*, 9 Nev. 379; *Watkins v. Page*, 2 Wis. 97; *Reeside v. Fischer*, 2 Har. & G. (Md.) 320; *Spring v. Bourland*, 6 Eng. (Ark.) 658; *Watson v. Todd*, 5 Mass. 271; *Mulholm v. Cheney*, *Addis* (Pa.), 301;

replevin of goods taken by an officer on execution was contempt of court.¹

§ 300. **Modern rule—Not so strict.** But this rule, as interpreted and applied by the courts to-day, is considerably modified. That is, the proceedings of the court, tribunal, or officer seizing the property must be regular and valid, or the property is not now held to be protected from seizure by the true owner in replevin, and the bringing of this action to test the validity of the law, the appointment of the officer, or the regularity or legality of the proceedings, is no longer regarded as an infringement of the sacred prerogative of the court, but is favored as a ready and convenient method to test the legality of the first seizure. There are, too, some exceptions to the rule, as replevin may now be brought for property exempt from seizure for debt—directly by the judgment debtor. Replevin is the proper remedy where property has been seized by an officer, and is being held under a writ, and is about to be sold, and injunction will not lie to restrain the officer by one who claims to be the owner of the property.² The general rule that a defendant in execution cannot maintain replevin for the goods seized thereunder only applies when the officer is proceeding rightfully.³ If the officer levy on exempt property, the defendant may sue out the writ.⁴ Property held under execution may be replevied in Connecticut,⁵ but not in New Hampshire.⁶

Goodheart v. Bowen, 2 Bradw. (Ill.) 578; *Badlam v. Tucker*, 1 Pick. 389; *Brownell v. Manchester*, 1 Pick. 234; *Milliken v. Selye*, 6 Hill, 623; *Squires v. Smith*, 10 B. Mon. (Ky.) 33; *Cromwell v. Owings*, 7 Har. & J. 55; *McLeod v. Oates*, 8 Ired. (N.C.L.) 387; *Musgrove v. Hall*, 40 Me. 498; *Armell v. Lendrum*, 47 Iowa, 535.

¹ *Winnard v. Foster*, 2 Lutw. 1190; *Rex v. Monkhouse*, 2 Strange, 1184.

² *Richards v. Kirkpatrick*, 53 Cal. 433.

³ *Sherron v. Hall*, 4 Lea (Tenn.), 499; *Dearman v. Blackburn*, 1 Sneed (Tenn.), 390.

⁴ *Wilson v. McQueen*, 1 Head. 17; *Harris v. Austell*, 2 Bax. 151; *Westenberger v. Wheaton*, 8 Kan. 169.

⁵ *Hilton v. Osgood*, 49 Conn. 110.

⁶ *Mitchell v. Roberts*, 50 N.H. 486; *Kellogg v. Churchill*, 2 N. H. 412;

§ 301. **A stranger to the writ of seizure may replevy.** Where a third person's property is taken on execution, he does not have to intervene as a claimant in that suit, but his proper remedy is replevin against the officer.¹ In Mississippi, by a statute passed in 1880, § 2633, replevin cannot be brought for property attached against an officer, but this is held to not protect a purchaser of the property under the attachment sale. Replevin may be brought against such purchaser by the true owner, though he made no claim to it while held by the officer.² But this is not so in case of an attachment by landlord for rent due. In such special proceeding, the claimant must intervene or be forever barred.³ Where property held under execution was allowed to remain in the debtor's hands, and he represented to his creditors that it was his property, to their damage, they were allowed to maintain replevin.⁴

§ 302. **The same.** Replevin lies against the vendee of the sheriff for goods levied on and sold by virtue of an execution against a third party.⁵ Such sale passes no title to the purchaser.⁶ The rightful owner may replevy from the officer after levy.⁷ An action of claim and delivery of personal property can be maintained by the owner against an officer taking the same under an execution against a third person.⁸ The owner of property, having the right to posses-

Smith v. Huntington, 3 N. H. 76; Melcher v. Lamprey, 20 N. H. 403; Sanborn v. Leavitt, 43 N. H. 473; Hilliard on Remedies for Torts, 29; Kittridge v. Holt, 55 N. H. 621; Carlin v. Babbitt, 58 N. H. 579.

¹ State v. Booker, 61 Miss. 16. This is apparently overruled by Clark v. Clinton, 61 Miss. 337, on the ground that the court from which the execution issued is the only one that had jurisdiction to dispose of the matter, but no reference is made to the earlier case.

² Armistead v. Bernard, 62 Miss. 180.

³ Paine v. Hall, 64 Miss. 175 (1 So. 56).

⁴ Mulholm v. Cheney, Add. (Pa.) 301.

⁵ Ward v. Taylor, 1 Pa. St. 238; Shearick v. Huber, 6 Binn. (Pa.) 2; Huber v. Shearick, 2 Brown (Pa.), 160.

⁶ Hicks v. Britt, 21 Ark. 422; Crittenden v. Lingle, 14 Ohio St. 182; Coombs v. Gorden, 59 Me. 111.

⁷ Angell v. Keith, 24 Vt. 371.

⁸ Jones v. Ward, 77 N. C. 337; Churchill v. Lee, 77 N. C. 341.

sion thereof, may take it by replevin from an officer seizing it upon process issued against a third person as his property.¹ The fact that the officer holds it under process issued by the circuit court will not deprive the district court of jurisdiction in the action of replevin.² But in North Carolina it is held that where an execution is issued against A, and levied *bona fide* on property in B's possession on the allegation that the property really belongs to A, replevin will not lie against the sheriff.³ But the general rule is that if an officer either by mistake or design take goods not the property of the defendant in his writ, or not liable to be taken on the writ, replevin will lie by the injured party.⁴ Although the doctrine that a stranger to an execution, whose goods have been taken for the debt of another, may bring replevin, is well established, still, many authorities have laid down the rule that while so held the true owner cannot take possession or maintain replevin, but must ask their release on a proper showing, try the rights of property, or sue for conversion.⁵

§ 303. **A purchaser of property so taken is not protected from replevin.** Replevin will lie by the true owner for property purchased at a constable's sale. An actual and forcible taking from the plaintiff need not be shown.⁶ An

¹ Smith v. Montgomery, 5 Iowa, 370; Gimble v. Ackley, 12 Iowa, 27; Shea v. Watkins, 12 Iowa, 605; Cooley v. Davis, 34 Iowa, 128; Seaton v. Higgins, 50 Iowa, 305.

² Ramsden v. Wilson, 49 Iowa, 211.

³ Carroll v. Hussey, 9 Ired. (N. C. L.) 89.

⁴ Stone v. Bird, 16 Kan. 488; Chinn v. Russell, 2 Blackf. 172; Gardner v. Campbell, 15 Johns. 401; Tison v. Bowden, 8 Fla. 70; Hunt v. Pratt, 7 R. I. 283; Gibson v. Jenny, 15 Mass. 205; Clark v. Skinner, 20 John. 468; Foss v. Stewart, 14 Me. 312; Bean v. Hubbard, 4 Cush. (Mass.) 85; Deyo v. Jennison, 10 Allen, 410; Leavitt v. Metcalf, 2 Vt. 343; Haskill v. Andros, 4 Vt. 609; Mulholm v. Cheney, Addis (Pa.), 301.

⁵ Gloss v. Black, 91 Pa. 418; Goodrich v. Fritz, 4 Ark. 525; Spring v. Bourland, 11 Ark. 658; Raitford v. Hyde, 36 Ga. 93; Lathrop v. Cook, 14 Me. 414; Perry v. Richardson, 9 Gray (Mass.), 216; Kellogg v. Churchill, 2 N. H. 412; Melcher v. Lamprey, 20 N. H. 403; Gardner v. Campbell, 15 Johns. (N. Y.) 401; Sharp v. Whittershall, 3 Hill (N. Y.), 576; Griffith v. Smith, 22 Wis. 646; Battis v. Hamlin, 22 Wis. 669.

⁶ Hardy v. Clendening, 25 Ark. 436. See Gibbs v. Chase, 10 Mass.

owner of property may bring replevin against one who purchased the property at a sale upon an execution against a third person.¹

§ 304. But where one's goods have been wrongfully seized by an officer, and the owner thereafter acquires peaceful possession, he is protected therein, and the officer cannot replevy from him or take the property again on that process, and for such a taking the owner is not liable.² And where goods come peaceably to the possession of the owner, who was a stranger to the execution, and they were retaken from him by the sheriff, he was allowed to maintain replevin for their recovery from the officer; that is, an officer who takes possession of property must keep possession, especially if that possession is wrongful. The law will presume nothing in his favor.³

§ 305. Mere irregularity insufficient. A possessory warrant will not lie against a purchaser at a judicial sale made under the forms prescribed by law, on the ground that a trespass was committed by the levying officer in taking possession of the property, the purchaser not being *particeps* in the *tort*.⁴ It is no ground for replevin against a constable holding under an execution that the constable did not make an inventory, unless the property in fact be exempt, when it could be replevied anyway,⁵ or that the attachment proceedings under which defendant claims were irregular, as that the bond had but one surety. If the parties appeared

125; Robinson v. Mansfield, 13 Pick. 130; Phillips v. Hall, 8 Wend. 610; Allen v. Crary, 10 Wend. 349; Fonda v. Van Horne, 15 Wend. 631; Noff v. Thompson, 8 Barb. 213.

¹ Dodd v. McCraw, 8 Ark. 83.

² Spencer v. McGowen, 13 Wend. 256; Marsh v. White, 3 Barb. 518; Sim v. Reed, 12 B. Mon. (Ky.) 51; Kunkle v. State, 32 Ind. 220; Wood v. Hyatt, 4 John. 313; Hyatt v. Wood, 4 John. 150; Bells v. Kinson, 1 Fost. (21 N. H.) 448; Merritt v. Miller, 13 Vt. 416; Barnes v. Martin, 15 Wis. 240.

³ Hall v. Tuttle, 2 Wend. 476.

⁴ Finney v. Fechtner, 54 Ga. 501.

⁵ Ferguson v. Washer, 49 Mich. 390 (13 N. W. 788).

in the attachment suit, the judgment in that action is *res adjudicata* as to them.¹ Or that the defendant who holds by virtue of an order in attachment was not a regular officer authorized to serve writs generally, against a trespasser claiming the property, his authority will be presumed.² It is no ground for replevin against an officer holding under a writ issued by a court having jurisdiction that the property in that proceeding in his writ was insufficiently described as "400 sheep."³

§ 306. **Exempt property may be replevied.** But replevin will lie for exempt property against the purchaser at the execution sale.⁴ It will lie for exempt property attached by an officer after inventory and appraisal under the poor laws.⁵ Where exempt property is attached, the owner may bring replevin without moving for a release of the property or a dissolution of the attachment.⁶ A judgment and order to sell property actually exempt is no bar to a replevin action.⁷ But this privilege is only for citizens of the state.⁸ Where property levied on is claimed as exempt, the debtor, after proper demand and schedule, may maintain replevin for the exempt property against the officer.⁹ The exemption allowed by statute may be waived, the party entitled to it must claim it in time—before sale.¹⁰ If waived by the debtor,

¹ Bryant v. Hendee, 40 Mich. 543.

² Miller v. Foy, 40 Wis. 633.

³ Lawrence v. Coyne, 62 Cal. 124.

⁴ Harris v. Austell, 2 Bax. (Tenn.) 148.

⁵ Mann v. Welton, 21 Neb. 541 (32 N. W. 599); Willson v. McQueen, 1 Head. (Tenn.) 17.

⁶ Drummond v. Hopper, 4 Harr. (Del.) 327.

⁷ Wilson v. Stripe, 4 G. Green (Iowa), 551; Wilson v. McQueen, 1 Head. (Tenn.) 17; Bean v. Hubbard, 4 Cush. 86.

⁸ Newell v. Hayden, 8 Iowa, 140; Sims v. Reed, 12 B. Mon. (Ky.) 53; Moseley v. Andrews, 4 Miss. 55; Elliott v. Whitmore, 5 Mich. 532; Lynd v. Pickett, 7 Minn. 184; Douch v. Rahner, 61 Ind. 64.

⁹ Douch v. Rahner, 61 Ind. 64.

¹⁰ O'Donnell v. Seger, 25 Mich. 371; Seaman v. Luce, 23 Barb. 240; Newell v. Hayden, 8 Iowa, 140; Bonsall v. Comly, 44 Pa. St. 442; Miches v. Tousley, 1 Cow. 114; Earl v. Camp, 16 Wend. 562.

it cannot be asserted by another person.¹ If only a certain amount of a particular kind of property is exempt, and it is all levied on, replevin will not lie until the debtor makes his selection and notifies the officer thereof.² A mortgage is only a waiver as against the mortgagee.³ The officer with the writ need not ask what property is exempt, but should levy and let the debtor make his claim under the exemption laws of his state.⁴

§ 307. **The same—Construction—Costs.** The exemption laws are favored by the courts and are construed liberally; thus, under a statute which exempts swine, the flesh of such swine, when killed and cured into meat, is also exempt.⁵ And the butter made from the milk of an exempt cow is exempt.⁶ And dental tools have been held to be within the scope of a statute exempting "mechanical tools," and exempt.⁷ But where the statute exempts feed for domestic animals for a certain time, the debtor is not entitled to the feed unless he actually has the animals.⁸ Costs should be allowed in replevin for exempt property the same as in other cases. If the officer is in fault, he should be mulcted in costs. If the debtor has stood by and seen exempt property levied on without objecting, he should pay the costs.⁹

§ 308. **Exempt property may be replevied in any court having jurisdiction, notwithstanding the statute provides a special proceeding.** A judgment debtor whose exempt property has been seized can maintain replevin therefor against the sheriff, and is not confined to the special remedy

¹ Howland v. Fuller, 8 Minn. 50.

² Tullis v. Orthwein, 5 Minn. 377.

³ Reynolds v. Salee, 2 B. Mon. (Ky.) 18.

⁴ Twinam v. Swart, 4 Lans. (N. Y.) 263.

⁵ Gibson v. Jenny, 15 Mass. 206.

⁶ Leavitt v. Metcalf, 2 Vt. 342; Haskill v. Andros, 4 Vt. 610.

⁷ Maxon v. Perrott, 17 Mich. 333.

⁸ Foss v. Stewart, 14 Me. 312.

⁹ Whitaker v. Wheeler, 44 Ill. 447; Livor v. Orser, 5 Duer. 501; Pozzoni v. Henderson, 2 E. D. Smith, 146; Saffell v. Walsh, 4 B. Mon. (Ky.) 92.

provided by statute in such cases, or to the court from whence the execution issued, but can bring his action in any court having jurisdiction.¹

§ 309. **Attached property may be replevin.** Courts have been more liberal in allowing the replevin of attached property than in property held by execution. It may be regarded as settled that replevin lies for attached property by any claimant thereof except the defendant in the attachment writ. Although replevin lies for property attached if that property be converted into money, pending the litigation, replevin does not lie for the proceeds. The money is to remain in court to abide the order of the court.² Property which has been attached can be taken out of the hands of the attaching officer by a writ of replevin, sued out by a third person who claims to be entitled to the property and the possession thereof, and he cannot be enjoined.³

§ 310. **Replevin cannot be brought by an attachment plaintiff** for property taken under the attachment proceedings against the officer serving the attachment. It is his duty to hold the property subject to the result of that suit.⁴

§ 311. **But if he pay claim of plaintiff, may then replevy from the officer.** The assignee of goods under an attachment, having paid the claim of the first attaching creditor, may, after notice and demand, maintain replevin against the officer.⁵

§ 312. **Where the process of seizure is void, or the court had no jurisdiction.** An execution, void on its face, is no protection to an officer making a levy on chattels

¹ *Ross v. Hawthorn*, 55 Miss. 551.

² *Gallagher v. Goldfrank*, 63 Texas, 473.

³ *Hopkins v. Drake*, 44 Miss. 619; *Samuel v. Agnew*, 80 Ill. 553; *Clark v. Skinner*, 20 Johns. 465; *Thompson v. Butler*, 14 Johns. 84; *Garner v. Campbell*, 15 Johns. 401; *Judd v. Fox*, 9 Cow. 259; *Climer v. Russell*, 2 Blackf. 172; *Daggett v. Robins*, 2 Blackf. 415; 3 *Robinson's Practice*, 477; *Allen on Sheriffs*, 272; *Heagle v. Wheeland*, 64 Ill. 423.

⁴ *Vaneter v. Crossman*, 39 Mich. 610; *Hawk v. Leppel* (N. J.), 17 A, 351.

⁵ *Whipple v. Thayer*, 16 Pick. (Mass.) 25.

thereunder, and he is liable therefor in replevin, trespass, or trover.¹ Or, if the court do not have jurisdiction, or the writ of seizure be void, replevin will lie.² Replevin lies for property seized upon an execution issued in void garnishment proceedings.³ Goods irregularly attached by an officer are not in the custody of the plaintiff in the suit, and replevin does not lie against him.⁴ But if the plaintiff buy it in at the attachment sale, knowing it to be exempt, and afterwards sells it, he thereby ratifies the act of the officer, and becomes jointly liable with him for the trespass.⁵

§ 313. **Property seized under an unconstitutional law cannot be said to be held under legal process, and may be replevied.**⁶ Where liquors were seized under a void city ordinance, *held*, that replevin would lie for their recovery by the owner.⁷

§ 314. **The writ must be lawfully executed.** When the levy is void for any wrongful act of the officer, replevin will lie by defendant in execution as though he were a stranger, as where it was levied on Sunday.⁸

§ 315. **Lies for powder condemned by city officers.** Where the city council, in attempting to regulate the sale of powder within certain limits, went outside of their powers and declared it condemned, and refused possession of it to the owner, *held*, that he could maintain replevin therefor.⁹

§ 316. **Liquors seized under a statute forbidding their sale cannot be replevied.** Where liquors were seized and were awaiting the action of the court, to decide whether they

¹ *Munis v. Herrera*, 1 N. M. 362.

² *Breckenridge v. Johnson*, 57 Miss. 371; *White v. Jones*, 38 Ill. 165; *Campbell v. Williams*, 39 Iowa, 646.

³ *Iron Cliffs Co. v. Lahais*, 52 Mich. 394 (18 N. W. 121).

⁴ *Cogan v. Stoutenburgh*, 7 Ohio, (Pt. II) 133.

⁵ *Murphy v. Sherman*, 25 Minn. 196.

⁶ *Cooley v. Davis*, 34 Iowa, 128.

⁷ *Sullivan v. Stephenson*, 62 Ill. 290.

⁸ *Pierce v. Hill*, 9 Porter (Ala.), 151; *Bryant v. The State*, 16 Neb. 451.

⁹ *Cotter v. Doty*, 5 Ohio, 395.

should be condemned or not under a statute forbidding their keeping or sale, they cannot be replevied.¹ And even if the statute recognized the right to keep liquors for certain purposes, as for use in the arts, and defendant claimed to have them for a lawful purpose, still, this does not authorize him to bring replevin, as that defense can be as well made in the action for their condemnation.² In Iowa, intoxicating liquors are governed by the common law rule, and when held under attachment or other legal process cannot be replevied.³ The theory of these cases is that the property is brought into court for a specific purpose, and is not, therefore, repleviable as that would defeat the very object of the special proceeding.

§ 317. **Property seized by special officers of the law cannot be replevied.** A vessel seized under the act for the protection of clams and oysters is in *custodia legis*, and cannot be replevied. And a plea to the jurisdiction of the court from whence the writ of replevin issued is proper.⁴ Where a sheriff as tax collector does not proceed strictly according to law, replevin will lie against him by the owner for property distrained, though the tax be valid and unpaid.⁵ Oil seized by an inspector of oil is in *custodia legis*, and cannot be replevied. The proper remedy is trespass.⁶ In replevin for meat taken by a health officer, the mere fact that he took it is not presumptive evidence that he condemned it in the legal discharge of his official duties. Such fact must be pleaded and proved, or his taking will be held wrongful.⁷

¹ Funk et al. v. Israel, 5 Iowa, 450; Manty v. Arneson, 25 Iowa, 383.

² Allen v. Staples, 6 Gray (Mass.), 491; State v. Barrels of Liquor, 47 N. H., 378.

³ Cooley v. Davis, 34 Iowa, 138; Weir v. Allen, 47 Iowa, 482; Fries v. Porch, 49 Iowa, 351.

⁴ Day v. Compton, 37 N. J. 514, citing Novion v. Hallett, 16 Johns. 327, and Gelston v. Hoyt, 3 Wheat. 329.

⁵ Ray v. Horton, 77 N. C. 334.

⁶ Elkins v. Griesemer, 2 Pennyp. (Pa.), 52; Pott v. Oldwine, 7 Watts, 173; Stiles v. Griffith, 3 Yeates, 82.

⁷ Kammon v. Lane, 55 Mich. 426 (21 N. W. 872).

§ 318. **Property seized by revenue collector can not.** Replevin does not lie for property of the plaintiff seized under a warrant by a collector of internal revenue as the property of another.¹

§ 319. **An assignee in bankruptcy is only protected where he acts strictly within the scope of his duties and authority.** If he seize the property of a stranger, replevin will lie against him at once in the state court, without the twenty days' notice required by the bankrupt act.² An action in replevin cannot be maintained against an assignee in bankruptcy until the demand and twenty days' notice required by the United States statutes, § 5056, be given, but if the assignee took the property from plaintiff's possession, the act does not apply. The averment by defendant that he holds the property as assignee, and that he has no knowledge as to whom the property really belongs, puts plaintiff upon proof of his title.³ A trustee in bankruptcy can maintain replevin for property belonging to the bankrupt, but held by one who claims under a contract of purchase, but who has not fulfilled the terms of the contract.⁴ He may also maintain replevin for property of the bankrupt sold on an execution against him after the decree in bankruptcy.⁵ It would be different with a voluntary assignee under the state law, who represents the assignor, rather than the creditors or the court, and takes the same right the assignor had and none other.⁶ The proper way, however, is to move in the court appointing the assignee to release the property claimed.⁷

¹ *Treat v. Staples*, 1 Holmes 1 (1st Circ.).

² *Leighton v. Harwood*, 111 Mass. 67. See *In re. Noakes*, 1 Bankr. Reg. 164; *Freeman v. Howe*, 24 How. 450; *Edge v. Parker*, 8 B. & C. 697; *Wiswall v. Lampson*, 14 How., 52; *Noe v. Gibson*, 7 Paige, 515; *Robinson v. Atlantic, &c., Ry.* 66 Pa. St. 160.

³ *Erb v. Perkins*, 32 Ark., 428; *Leighton v. Harwood*, 111 Mass. 69; *Rowe v. Page*, 54 N. H., 191.

⁴ *Gordon v. Farrington*, 46 Mich. 420 (9 N. W. 456).

⁵ *Coats v. Farrington*, 46 Mich. 422 (9 N. W. 456.)

⁶ *Wageman v. Barrows*, 41 Mich. 363.

⁷ *Sawtelle v. Rollins*, 23 Me. 199; *Fowler v. Down*, 1 Box. & Pull. 44;

§ 320. **Receiver—Comity of states—Will respect officers of sister states.** A receiver appointed by the courts of a sister state may maintain replevin in this state in his individual capacity to recover the property from an attaching creditor in this state.¹ A receiver cannot bring replevin in a law court against one having a right to possession of the property in question by virtue of the process of the law court.² Neither can a receiver bring replevin for property seized under a paramount title.³ The court will enjoin an action of replevin against a receiver where it is brought without leave, if he was acting within the scope of his authority.⁴

§ 321. **Replevin lies against a receiver where he takes the wrong property.** A receiver of an insolvent national bank acquires no right to property in the custody of the bank, which it does not own, as against the owner, and he may maintain replevin therefor in a state court.⁵ Replevin will lie by the owner for property seized by a receiver, to which the debtor never had title, and the owner need not first obtain permission of the court to bring the suit.⁶ This is on the theory that as to this property he is not a receiver, but a trespasser. The better way in such cases is to call the attention of the court whose officer he is to the facts by motion, and if its receiver has taken property to which he had no right, the court will always instruct him to release it.⁷

§ 322. **The legislature may bar the right by replevin.** Where the legislature enacted an agricultural lien law for the protection of landlords, and provided that on seizure of the crop under the claim of lien, all persons interested in the

Hurst v. Gwennap, 2 Stark, 306; Webb v. Fox, 7 Term R. 392; Bolander v. Gentry, 36 Cal. 109.

¹ Cagill v. Wooldridge, 8 Bax. (Tenn.) 580.

² Conley v. Derre, 11 Lea (Tenn.), 274.

³ High on Receivers, 136.

⁴ High on Receivers, 256. See Beach on Receivers, § 249-290.

⁵ Corn Exchange Bank v. Blye, 101 N. Y. 303 (4 N. E. 635).

⁶ Hills v. Parker, 111 Mass. 508; Parker v. Browning, 8 Paige, 338; Paige v. Smith, 99 Mass. 395; Leighton v. Harwood, 111 Mass. 67.

⁷ Parker v. Browning, 8 Paige, 338; *In re Vogle*, 7 Blatchf. 19.

crop should intervene and should be bound by the judgment, property so taken is in custody of the law and cannot be replevied. The legislature could make the remedy by intervention exclusive.¹ But if the court do not have jurisdiction, or the writ of seizure be void, replevin will lie.² In Virginia the legislature abolished replevin by statute.

§ 323. **Property held by special order of court—Fine.** Property claimed to have been stolen and held under orders of the court pending the trial of the alleged thief is in the custody of the law, and cannot be replevied by the owner.³ Where property is seized and sold for a fine, the party against whom the fine was recovered, and whose property was sold in satisfaction thereof, may contest the purchaser's title to the property and the jurisdiction of the court and the validity of the proceedings by which it was sold in an action of replevin.⁴ If property be seized on a sheriff's fee bill, the action of replevin is not the proper remedy to try the legality of the seizure.⁵

§ 324. **Property held by United States marshal cannot be replevied in state court.** A plea that the property replevied was held by the United States marshal by virtue of a writ of execution issuing out of the circuit court of the United States presents a complete defense as to the jurisdiction of the state court over the subject matter of the replevin suit.⁶ A sheriff cannot replevy from a United States marshal holding an order of attachment from the United States court.⁷ Where goods are seized and held by a marshal under valid process from a United States court, such process is a complete defense, and gives him the right to hold the property, against any writ issued from a state court. In such a

¹ *Dogan v. Bloodworth*, 56 Miss. 419.

² *Breckenridge v. Johnson*, 57 Miss. 371.

³ *Simpson v. St. John*, 93 N. Y. 363.

⁴ *Heagle v. Wheeland*, 64 Ill. 423.

⁵ *Morgan v. Craig*, Hard. (Ky.) 101.

⁶ *Hannebutt v. Cunningham*, 3 Bradw. (Ill.) 353; *Munson v. Harroon*, 34 Ill. 422.

⁷ *Freeman v. Howe*, 24 How. 450.

suit the state court cannot extend its inquiries beyond the question as to whether the federal process was valid; and if so, the question of title to the goods is irrelevant. In such a case the state court has jurisdiction to order a return of the property to the marshal.¹

§ 325. **But where the marshal has taken the wrong person's goods or is proceeding illegally, it will lie.** A United States marshal holding under bankruptcy proceedings may not remove goods into another district before sale, and replevin will lie against him unless he proceed regularly.² Replevin lies against a United States marshal to recover goods belonging to the plaintiff and attached by defendant under process against another person.³ Replevin will lie in a justice's court to recover property wrongfully seized on federal process by a United States marshal, if its value is below the jurisdictional limit of the federal court and within that of the justice.⁴

§ 326. **Replevin for property illegally seized may be brought in any court having jurisdiction.** While it may be considered as the well settled rule of law that where an officer has levied upon the wrong property, or failed to make a valid levy, or for any reason has lost his possession under the levy, or is proceeding illegally, or the writ or proceedings upon which it is based are void, replevin will lie. Much discussion has arisen over the proper tribunal in which the replevin suit should be brought, some courts holding that it

¹ *Fensier v. Lammon*, 6 Nev. 209; *Freeman v. Howe*, 24 How. 450; *Peck v. Jenness*, 7 How. 624; *Buck v. Colbath*, 3 Wallace, 334. United States court may consent to replevin in state court. *Mitchell v. Smith* (Col.), 21 Pac. 1026.

² *Carr v. Phillips*, 39 Mich. 319. See *Maddux v. Usher*, 2 Fox's Decisions, 261.

³ *Cooper v. Tompkins*, 43 Mich. 406 (5 N. W. 456); *Heyman v. Covell*, 44 Mich. 332 (6 N. W. 846).

⁴ *Carew v. Matthews*, 41 Mich. 576. This decision is based on the ground that if plaintiff could not bring replevin, she was without remedy, and refers to *Buck v. Colbath*, 3 Wall. 334. A contrary doctrine is laid down in the case of *Freeman v. Howe*, 24 How. 450.

must be in the court from which the process issued under which the property is held; others that it could be brought in any court having jurisdiction of the subject matter. One of the leading cases on this subject is *Freeman v. Howe*, which arose in this way: Process in attachment in an ordinary action for debt was issued from a United States court, and by its marshal levied upon thirteen cars as the property of the Vermont & Massachusetts Railroad Company, whose property the writ commanded him to levy upon. Replevin was brought in a state court of Massachusetts. The marshal defended under his writ, and that replevin would not lie. The supreme court of Massachusetts held, in a well considered opinion, that replevin would lie in the state court, putting it upon the ground that the writ of attachment gave a general command to the marshal to levy on the property of the defendant therein named, and if he had made a mistake and levied on property of a stranger, and not the property of the defendant, he was entitled to no protection, and the property thus wrongfully seized in disobedience to the command of the writ was not in the custody of the law.¹ But the case was carried to the supreme court of the United States, where the supreme court of Massachusetts was reversed, and the broad doctrine laid down that replevin would not lie against the marshal in a state court. The court seemed to overlook the distinction between writs of attachment, where the command to the officer is general to seize the property of the defendant therein named, and writs where the officer is commanded to seize a specific chattel therein named. The rule laid down would be good law in the latter case, but in the former has nothing to support it but the prestige and authority of the court rendering the decision.² This decision is a good example of the futility of courts attempting to *make* or *interpret* laws contrary to reason and justice.

¹ *Howe v. Freeman*, 14 Gray (Mass.), 572.

² *Freeman v. Howe*, 24 How. (U. S.) 450.

So far as the writer is aware, the decision has not been followed and approved by a single inferior court, though its binding force as a precedent has been recognized by some under protest. The supreme court of Minnesota, in referring to this subject, say of the case of *Freeman v. Howe*: "If we understand this decision, it is based upon the sole ground that one court cannot take the property from the custody of another by replevin, or any other process, for this would produce a conflict extremely embarrassing to the administration of justice. Whether this evil may be greater than that of always compelling a party to resort to the court out of which the process issued, upon which his property has been seized, to assert his legal rights, may well be questioned."¹ The Wisconsin court say: "That the conclusions of the court (in *Freeman v. Howe*) do not appear to be based upon any effect given to any provision of the constitution or laws of the United States, so that its decision would not, according to the prevailing opinion, be binding in the state courts."² It seems strange how the supreme court could arrive at such a decision in the face of *Slocum v. Mayberry*, 2 Wheat. 2, which was a case where a ship was seized for an alleged violation of law, the cargo being taken by the United States officer, with the ship. The owner of the cargo brought replevin in the state court of Rhode Island, and his right to do so was upheld by the United States supreme court. And the supreme court has had occasion to explain *Freeman v. Howe* at least once, when Mr. Justice Miller said: "The decision in *Freeman v. Howe* took the profession generally by surprise, overruling, as it did, the unanimous opinion of the supreme court of Massachusetts, as well as the opinion of Chancellor Kent."³ It seems to the writer that the tendency of the United States courts to draw to themselves and hold all litigation possible, might

¹ *Lewis v. Buck*, 7 Minn. 104.

² *Kinney v. Crocker*, 18 Wis. 79.

³ *Buck v. Colbath*, 3 Wal. (U. S.) 334; 1 Kent Com. 410; *Slocum v. Mayberry*, 2 Wheat. 2.

have influenced this decision. This grasping tendency of the federal courts has in the past been made a subject for restrictive acts by Congress, and is readily apparent to any student of our system. The federal judicial system should be thoroughly revised, and its powers and jurisdiction more clearly defined and more strictly limited. The courts as far back as 1687¹ held that a sheriff with process directing him to levy on a defendant's property, therein named, must do so at his peril, and if he made a mistake and levied on a stranger's goods he was liable, and would not be protected by the courts, whose commands he had *disobeyed*. In such cases, the better rule is unquestionably that replevin will lie in any court having jurisdiction of the subject matter.²

§ 327. **May be brought where property is or where defendant resides.** An action of replevin may be brought in any county where the defendant resides. Where immediate delivery of the property claimed is not sought, no affidavit or bond need be filed.³ An action of replevin may be brought either in the county where the defendant resides or where the property is situated, but the venue cannot properly be laid in a county other than one of these, upon an allegation that the property was wrongfully removed therefrom by the defendant.⁴ And when so properly brought in the county where the property is, against two defendants, the action may be dismissed as to the defendant in that county, without dis-

¹ *Hallet v. Byrt*, Cartl. 380.

² *Samuel v. Agnew*, 80 Ill. 554; *Caldwell v. Arnold*, 8 Minn. 265; *Weber v. Henry*, 16 Mich. 399; *Hanna v. Steinberger*, 6 Black, 521; *Ward v. Henry*, 19 Wis. 77; *Booth v. Ableman*, 16 Wis. 463; *Id.* 18 Wis. 496; *Id.* 20 Wis. 23; *Id.* 20 Wis. 633; *Kinney v. Crocker*, 18 Wis. 79; *Bruen v. Ogden* (11 N. J. L.), 6 Halst. 371; *Davidson v. Waldron*, 31 Ill. 121; *Carew v. Matthews*, 41 Mich. 576; *Cooper v. Tompkins*, 43 Mich. 406 (5 N. W. 456); *Heyman v. Covell*, 44 Mich. 332 (6 N. W. 846); *Carr v. Phillips*, 39 Mich. 319; *Maddux v. Usher*, 2 Fox's Decisions, 261; *Ross v. Hawthorn*, 55 Miss. 552.

³ *Hodson v. Warner*, 60 Ind. 214; *Catterlin v. Mitchell*, 27 Ind. 298.

⁴ *Hibbs v. Dunham*, 54 Iowa, 559 (6 N. W. 719).

missing as to the other defendant who resides in another county.¹

§ 328. **Removal of the property does not affect the jurisdiction.** If the action be properly brought in the county where the property may be taken, the removal of the property to another county by the defendant before the service of the writ does not abate the action. If the venue was properly laid at the commencement of the action, it is sufficient.² Where the action is commenced in the county where the property is against a defendant in another county, failure to get the property does not in Iowa defeat the action.³

§ 329. **The action may be brought in any court of competent jurisdiction.** As the plaintiff is the actor, he may in replevin, as in any other suit, choose in the first instance the forum he will trust with the settlement of the issue raised by him. If replevin would lie in the court from which the writ issued, under which his property has been wrongfully seized, it will lie in any court of competent jurisdiction.⁴ In New Hampshire replevin is held to be a local action, and must be commenced in the county where the unlawful taking occurred.⁵ But in Georgia it is held that a possessory action may be

¹ *Porter v. Dolhoff*, 59 Iowa, 459 (13 N. W. 420). But on this general subject of venue and dismissal of the action against the resident defendant, see *Allen v. Miller*, 11 Ohio St. 374, and *Cobbey v. Wright*, 23 Neb. 250 (36 N. W. 505), where a contrary rule is laid down, and in removal cases a contrary rule is followed; *Collins v. Wellington*, 31 Fed. R. 244.

² *Croft v. Franks*, 34 Iowa, 504. The Iowa Statute Rev. § 3853 provides that actions of replevin may be commenced in any county wherein a portion of the property is found. Under this statute replevin was brought for a horse in Fayette County. The defendant lived in Buchanan County and removed the horse there before service. *Held*, that this did not oust the court of its jurisdiction, and judgment for plaintiff upheld.

³ *Laughlin v. Main*, 63 Iowa, 580 (19 N. W. 673).

⁴ *Ross v. Hawthorn*, 55 Miss. 551; *Samuel v. Agnew*, 80 Ill. 554; *Carew v. Matthews*, 41 Mich. 576; *Buck v. Colbath*, 3 Wall. 334.

⁵ *Sleeper v. Osgood*, 50 N. H. 331. This is based upon statute, but follows the common law rule.

brought in any county where the property to be recovered is found.¹

§ 330. **Replevin against attaching officer—Where brought.** Replevin lies in favor of the owner against an officer who levies an attachment upon goods not the property of the defendant in attachment, if such owner is entitled to their possession. And such replevin suit need not be brought in the court from which the writ of attachment issued, but in any court of concurrent jurisdiction emanating from the same sovereignty.²

§ 331. **May be removed from state to federal court.** A replevin suit which could not have been brought in the federal court may be removed from the state to the federal court under the same conditions that any other suit could be removed.³

§ 332. **When an execution defendant can replevy.** An execution defendant cannot maintain replevin except where he shows that the property is not subject to seizure on execution.⁴ And this is so, even if the facts are such that he can enjoin the sale under the levy.⁵ Replevin against the officer will lie by the execution debtor when his exempt property has been levied on.⁶ Most of the states have followed the common law so far as to forbid an execution defendant the right to bring replevin against the officer, provided the proceedings are regular and valid and the property not exempt.⁷ Goods taken in execution are in the custody of the

¹ *Jordan v. Owen*, 67 Ga. 616.

² *Samuel v. Agnew*, 80 Ill. 553; *Clark v. Skinner*, 20 Johns. 465; *Thompson v. Butler*, 14 Johns. 84; *Garner v. Campbell*, 15 Johns. 401; *Judd v. Fox*, 9 Cow. 259; *Climer v. Russell*, 2 Blackford, 172; *Doggett v. Robins*, 2 Blackford, 415; 3 *Robinson's Practice*, 477; *Allen on Sheriffs*, 272; *Heagle v. Wheeland*, 64 Ill. 423.

³ *Kern v. Huidekoper*, 103 U. S. 485.

⁴ *Hartlep v. Cole*, 101 Ind. 458; *McCoy v. Reck*, 50 Ind. 283; *Dowell v. Richardson*, 10 Ind. 573.

⁵ *Miller v. Hudson*, 114 Ind. 550 (17 N. E. 122). See *Climer v. Russell*, 2 Blackf. (Ind.) 172; *Lewisville v. Holborn*, 2 Blackf. (Ind.) 267.

⁶ *Wallingsford v. Bennett*, 1 Mackey (D. C.), 303.

⁷ *Talbot v. DeForest*, 3 G. Green (Iowa), 586; *Perry v. Richardson*, 9

law, and cannot be replevied except under a statutory provision authorizing it.¹ The reason of the rule is that it would be an unnecessary harassing and impeding of the officer in his official duties to allow replevin by a judgment defendant, and would be allowing the judgment defendant to litigate by replevin, in a court of his own choosing, matters which he should have litigated when sued for the debt by his creditor.² And a grantee of such a judgment defendant stands in no better light.³ In some states a distinction is made in this matter between an execution and attachment,⁴ but the decisions under such a statute are of no general value.

Gray, 216; *Melcher v. Lamprey*, 20 N. H. 403; *Morris v. De Witt*, 5 Wend. 71; *Orner v. Hollman*, 4 Whart. (Pa.), 45; *Kellogg v. Churchill*, 2 N. H. 412; *Isley v. Stubbs*, 5 Mass. 280; *Wilson v. McQueen*, 1 Head. (Tenn.), 19; *Hopkins v. Drake*, 44 Miss. 622; *Yarborough v. Harper*, 25 Miss. 112; *Dearman v. Blackburn*, 1 Sneed (Tenn.), 390.

¹ *Howard v. Crandall*, 39 Conn. 213; *Pangburn v. Partridge*, 7 Johnson, 144, and cases cited by reporter; *Hall v. Tuttle*, 2 Wend. 478, and cases cited by the court; *Smith v. Lyons*, 44 Conn. 175; *Thompson v. Button*, 14 John. 84.

² *Hall v. Tuttle*, 2 Wend. 478; *Thompson v. Button*, 14 John. 84; *Gardner v. Campbell*, 15 Johns. 402; *Judd v. Fox*, 9 Cow. 262; *Shaddon v. Knott*, 2 Swan (Tenn.), 358; *Isley v. Stubbs*, 5 Mass. 283; *Kellogg v. Churchill*, 2 N. H. 412; *Griffith v. Smith*, 22 Wis. 637; *Deshler v. Dodge*, 16 How. 622.

³ *Talbot v. DeForest*, 3 G. Green (Iowa), 586; *Saw v. Levy*, 17 S. & R. (Pa.) 102; *Hines v. Allen*, 55 Me. 115; *Gardner v. Campbell*, 15 Johns. 401; *Dunham v. Wyckoff*, 3 Wend. 280.

⁴ *Green v. Holden*, 35 Vt. 315.

CHAPTER XIV.

REPLEVIN OF PROPERTY SEIZED FOR A TAX.

	Section.		Section.
The general rule	333	A purchaser from the officer is not thus protected . . .	341
Errors in the assessment or in the warrant of collection no ground for replevin . . .	334	The same is true in case of seizure for a fine . . .	342
Warrant must be regular and issued by proper authority	335	Payment of tax after seizure no ground for replevin .	343
Illegality of the tax no ground for replevin	336	May tender the legal tax and bring replevin	344
Expensive, double, or erroneous assessments—No ground for	337	Property must be seized by an officer in his own district, or replevin will lie . . .	345
Will lie when tax is void . .	338	The illegality of the corporation no ground for replevin—Writ must be executed by a regular officer	346
Will not lie where part is valid and part invalid	339	No other remedy is prohibited	347
Where A's property is taken on a warrant for B's tax, A may replevy	340		

§ 333. **The general rule.** In the case of property seized for a tax, the courts have gone further than in any other case to uphold and protect the seizure. The reason for this has been partly in legislative enactments, which in most if not all of the states have prohibited the replevin of property so seized by requiring the plaintiff in his affidavit for replevin to swear that the property was not taken for any tax, fine, or amercement, and partly for reasons growing out of the fact that it is necessary to the very existence of a government that the prompt collection of its revenue be not interfered with. "Disastrous indeed would be the consequences to the public, "was it allowed to every taxable inhabitant who may have "conceived a notion that a law of general application imposing "taxes is void, and therefore he shall be permitted to arrest

"its operation, and thus break down the financial system of the state. If one may do it, the whole community may, and ruin and disgrace would inevitably follow the extinction of the state credit thus brought about. The law forbids the consideration of the question of the legality of a tax, assessment, or fine levied under any law standing on the statute book, by means of the action of replevin."¹ While the decisions of the courts are not uniform, it may be regarded as settled that, where property is seized for a tax upon a warrant not void on its face, such property cannot be replevied by the defendant in the tax warrant from the officer so seizing it. "The rule is one of protection merely, and beyond that is not meant to confer any right. The armor which it furnishes is strictly defensive. It is personal to the officer himself, and cannot be used to confer any right upon wrongdoers, under color of whose void proceedings he is called upon to act. Suppose he goes and sells the property levied upon; even the innocent purchaser takes no right." On this general subject see.²

¹ *McClaghry v. Cratzenberg*, 39 Ill. 122; *Maple v. Vestal* (Ind.), 16 N. E. 620.

² *Troy, &c., R. Co. v. Kane*, 72 N. Y. 614; *Hudler v. Golden*, 36 N. Y. 446; *Cheyary v. Jenkins*, 5 N. Y. 376; *O'Reilly v. Good*, 42 Barb. 521; *Stiles v. Griffith*, 3 Yeates, 82; *Bilbo v. Henderson*, 21 Iowa, 56; *Grindrod v. Lauzon*, 47 Mich. 584 (11 N. W. 396); *Pott v. Aldwine*, 7 Watts, 173; *Daniels v. Nelson*, 41 Vt. 161; *Travers v. Inslee*, 19 Mich. 98; *Stockwell v. Veitch*, 15 Abb. Pr. 412; *Trask v. Maguire*, 2 Dill. 182; *McCoy v. Anderson*, 47 Mich. 502 (11 N. W. 290); *Buell v. Ball*, 20 Iowa, 282; *LeRoy v. East Saginaw Ry.* 18 Mich. 234; *Keyser v. Waterbury*, 7 Barb. 650; *White v. Dolliver*, 113 Mass. 407; *Cooley on Taxation*, 818; *Desty on Taxation*, 804-5; *Brown on Assessment and Tax*, 131-2; *Dudley v. Ross*, 27 Wis. 679; *Macklot v. Davenport*, 17 Iowa, 379; *Traverse v. Inslee*, 19 Mich. 98; *Atlantic R. R. Co. v. Cleino*, 2 Dillon, 175; *Cardinel v. Smith*, Deady, 197; *Vocht v. Reed*, 70 Ill. 491; *Dunning v. James*, 72 Ill. 78; *Ross v. East Saginaw*, 18 Mich. 233; *Buell v. Ball*, 20 Iowa, 282; *Brackett v. Whidden*, 3 N. H. 17; *Emerick v. Stoon*, 18 Iowa, 139; *Enos v. Bemis*, 61 Wis. 656. The affidavit that the property is not taken for a tax, is not conclusive. *Kaehler v. Dobberpuhl*, 60 Wis. 256.

§ 334. **Errors in the assessment or in the warrant of collection no ground for replevin.** Replevin will not lie against an officer acting under a tax warrant for the collection of taxes assessed by a board having competent authority, although the tax may have been erroneously assessed.¹ While an irregular warrant or a void assessment is no protection to an officer in any other form of action, it has been held to be no ground for replevin of the property seized by him. Property taken for a tax cannot be withdrawn from the custody of the law for any such reason. If on its face the warrant give the officer authority to collect a tax, it ends the matter of replevin so far as the defendant in the tax warrant is concerned.² Although a warrant for the collection of a tax or assessment may have been issued erroneously or irregularly, if on its face it gives authority to the officer to collect the tax or assessment, replevin cannot be sustained for property taken by virtue of the warrant.³

§ 335. **Warrant must be regular and issued by proper authority.** But the warrant must be regular on its face and purport to be issued by competent authority.⁴ A warrant issued by some one not authorized to issue that class of warrants would not be sufficient. Or where the warrant is for a tax assessed for a special purpose, and the warrant shows on its face that the body assessing it acted illegally or beyond their authority, replevin will lie.⁵ And the plaintiff is not estopped from denying the validity of the tax because he has paid a similar tax at another time.⁶

¹ *Bilbo v. Henderson*, 21 Iowa, 56.

² *Hudler v. Golden*, 36 N. Y. 446; *Niagara Elevator Co. v. McNamara*, 2 Hun. (N. Y.) 416; *People v. Albany, &c.*, 7 Wend. 485; *Buell v. Schaale*, 39 Iowa, 293. In this case, plaintiff claimed his property was assessed in the wrong district. See also *Hershey v. Fry*, 1 Iowa, 593; *Macklot v. The City of Davenport*, 17 Iowa, 379.

³ *T. & L. R. R. Co. v. Kane*, 72 N. Y. 614; *Hudler v. Golden*, 36 N. Y. 446; *O'Reilly v. Good*, 42 Barb. 521.

⁴ *Hudler v. Golden*, 36 N. Y. 446.

⁵ *Wright v. Briggs*, 2 Hill, 77; *Morford v. Unger*, 8 Iowa, 82.

⁶ *Buell v. Ball*, 20 Iowa, 282.

§ 336. **Illegality of the tax no ground for replevin.** Replevin will not lie for property taken for a tax assessment. If the tax duplicate in the treasurer's hands is regular on its face, it is not necessary for him to show a legal assessment of taxes.¹ A collector of unpaid taxes levied under a regular warrant, whereupon the property was taken from him in an action for the claim and delivery thereof, instituted by the owner against whom the tax was imposed. *Held*, that the plaintiff could not sustain the action by proving that the tax was illegally imposed, and that the collector, having acquired a special property, was entitled to judgment for redelivery and damages for detention.² If list and warrant are regular, and only the tax erroneous, replevin will not lie.³

§ 337. **Excessive, double, or erroneous assessment no ground for.** Replevin will not lie against the collector of taxes to recover personal property seized to satisfy a tax levied by the proper officer, and it does not matter that the levy is excessive, and the fact is apparent on the face of the tax book.⁴ The fact that the property taken for the tax has been twice assessed—once in the hands of an agent—is no ground for replevin.⁵ Few assessments are regular in every way, and if errors of this kind could be reached by replevin, the number of such cases would be legion. Or it is no ground for replevin that plaintiff owes no tax to the town whose officer has made the seizure.⁶ Due process of law in

¹ *Adams v. Davis*, 109 Ind. 10 (9 N. E. 162); *People v. Albany C. P.*, 7 Wend. 485; *Hudler v. Golden*, 36 N. Y. 446; *Mount Carbon, etc., v. Andrews*, 53 Ill. 177; *Willard v. Kimball*, 10 Allen, 211; *Bringhurst v. Pollard*, 6 Ind. 452; *Maple v. Vestal*, 114 Ind. 325 (16 N. E. 620); *American Tool Co. v. Smith*, 32 Hun. (N. Y.) 121; *O'Reilly v. Good*, 42 Barb. 521; *Hill v. Graham* (Mich.), 40 N. W. 779.

² *Niagara Elevating Co. v. McNamara*, 43 N. Y. Sup. Ct. (1 Sheldon) 360; *Id.* 4 Thomp. & C. 604.

³ *Buell v. Schaaale*, 39 Iowa, 293.

⁴ *Mowrer v. Helferstine*, 80 Mo. 23.

⁵ *Palmer v. Corwith*, 3 Chand. (Wis.), 297.

⁶ *Mt. Carbon Coal Co. v. Andrews*, 53 Ill. 177.

the assessment of taxes does not require a judicial proceeding.¹

§ 338. **Will lie where tax is void.** Replevin lies against the tax collector when the assessment of the taxes for which the property was seized is *void*.² The statutory prohibition against bringing replevin for property taken under a tax warrant does not apply where there was no jurisdiction to levy the tax.³ Replevin will lie against an officer who has seized the property for an invalid tax, or upon a tax warrant void upon its face, but plaintiff cannot in such a case claim the immediate delivery of the property.⁴ This case under the Wisconsin law only amounts to allowing the officer to be sued for damages, which can be done everywhere. It must appear that the tax is one that could by no legal possibility be levied. Where property of an incorporated company was seized for a tax which could not be levied on them under their charter, they were allowed to bring replevin.⁵ And where a tax was levied at a town meeting, and at another meeting rescinded in a legal manner, but the collector went on and attempted to collect the tax and seized property for that purpose, the owner was allowed to replevy it on the ground of no legal tax.⁶ But the prohibition is not confined to property seized for a state tax, but applies with equal force to a

¹ Pullen v. Kensinger, 11 Int. Rev. Rep. 197. See Brown on Assessment and Tax, 131-2; Cooley on Taxation, 818; Desty on Taxation, 804-5.

² A. & P. R. R. Co. v. Chino, 2 Dill. (8 Cir. Mo.) 175.

³ McCoy v. Anderson, 47 Mich. 502 (11 N. W. 290). In this case the property was assessed in the township where manufactured and stored, when the law required it to be assessed in the township where the partnership had a place of business.

⁴ Dudley v. Ross, 27 Wis. 679. Chapter 128, § 1 and 2, of the Wisconsin statute provides that the plaintiff may at the time of issuing the summons, or at any time before answer, claim the immediate delivery of the property, and when he claims the delivery of the property, he must make affidavit that it was not taken for a tax, etc.; but where the delivery of the property is not claimed, it proceeds as a damage suit.

⁵ LeRoy v. East Saginaw Ry., 18 Mich. 237.

⁶ Stoddard v. Gilman, 22 Vt. 570.

city tax or tax levied by the federal government.¹ Where there was no authority to levy the tax, an action of replevin will lie to recover property seized by an officer for payment of same; but otherwise where the taxing authority is regularly exercised.²

§ 339. **Will not lie where part is valid and part invalid.** A party cannot bring replevin for the seizure of personal property by the treasurer to pay taxes if a portion of the tax is legally assessed, although another portion is illegal.³

§ 340. **Where A's property is taken on a warrant for B's tax, A may replevy.** The rightful possessor of goods unlawfully seized under a tax warrant against another, for the collection of the tax, may maintain an action for their recovery.⁴ If the collector under his warrant illegally seize the property of A to pay the tax of B, A may bring replevin.⁵ A statute which provides that no replevin shall lie for any property taken by virtue of a warrant for the collection of a tax, must be construed to apply only to cases where the prop-

¹ *Lavacool v. Boughton*, 5 Wend. 178; *Pullen v. Kensinger*, 11 Int. Rev. Rec. 197; *Delaware R. R. Co. v. Prettyman*, 7 Int. Rev. Rec. 101; *Brice v. Elliott*, 8 Legal News, 322; *O'Reilly v. Good*, 42 Barb. 521.

² *Bull v. Ball*, 20 Iowa, 282; *Leroy v. East Saginaw R. R.*, 18 Mich. 233.

³ *Emerick v. Sloan*, 18 Iowa, 139. See *Hudley v. Golden*, 36 N. Y. 446; *O'Reilly v. Good*, 42 Barb. (N. Y.) 521; *Stiles v. Griffith*, 3 Yeats (Pa.), 82.

⁴ *Dubois v. Webster*, 7 Hun. (N. Y.) 371; *Hallock v. Rumsey*, 22 Hun. 89.

⁵ *L. S. & M. S. Ry. v. Roach*, 8 N. Y. 339; *Stockwell v. Veitch*, 15 Abb. Pr. 412; *Thompson v. Button*, 14 J. R. 84; *Judd v. Fox*, 9 Cow. 259. In *Vocht v. Reed*, 70 Ill. 491, a contrary rule is laid down by a divided bench, but the reasoning of the court is not such as to commend the conclusion they reach. They say the owner's remedy in such a case is by an action of trover or trespass against the officer, and the opinion cites *McClaghry v. Cratzenberg*, 39 Ill. 117; *Mt. Carbon C. & R. Co. v. Andrews*, 53 Ill. 179; *Heagle v. Wheeland*, 64 Ill. 423. But it is a question whether these cases cited support the extreme ground taken by a majority of the court. In this particular case, as the levy was made upon personal property of one man to collect tax levied upon the land of another, it is difficult to uphold the position of the majority of the court, either in law or equity.

erty seized is that of the person, or one in privity with the person, against whom the tax is assessed.¹ But this rule does not apply where the tax collector finds the property seized in the possession of the delinquent named in his warrant.² He would be protected in his seizure unless his attention was called to the fact at the time.

§ 341. **A purchaser from the officer is not thus protected.** The statute which prohibits the replevin of property seized for taxes only protects while in the officer's hands. The purchaser under a tax warrant sale, like a purchaser at a judicial sale, must depend upon the strength of the title which he thereby acquires, and replevin will lie for the property in his hands by the true owner.³ A purchaser at such a sale when sued for the property must show the validity of the proceedings under which the sale was made, as well as the legality of the sale. Nothing is presumed in its favor.⁴

§ 342. **The same is true in case of seizure for a fine.** And the same is true where property is seized and sold for a fine or statutory penalty; the purchaser is not protected, and the true owner may bring replevin against him.⁵ The statute which prohibits the replevin of goods seized for a tax also embraces goods seized for payment of a fine, and the same rule of law is applicable.⁶

§ 343. **Payment of tax after seizure no ground for.** The payment of taxes, after the commencement of an action to replevy personal property seized by the treasurer for such taxes, cannot be given in evidence to sustain the action. Such payment of taxes, without protest, after the bringing of the

¹ *Travers v. Inslee*, 19 Mich. 98. See also *Stockwell v. Veitch*, 15 Abb. Pr. 412.

² *Palmer v. Corwith*, 3 Chand. (Wis.) 297.

³ *Power v. Kindschi*, 58 Wis. 539 (17 N. W. 689). This is a leading case on this subject, and will well repay perusal. *Dudley v. Ross*, 27 Wis. 679; *Macklot v. Davenport*, 17 Iowa, 379; *Heagle v. Wheeland*, 64 Ill. 423; *Stiles v. Griffiths*, 3 Yeats (Pa.), 82.

⁴ *Clark v. Lewis*, 35 Ill. 422.

⁵ *Heagle v. Wheeland*, 64 Ill. 423.

⁶ *Pott v. Oldwine*, 7 Watts, 173; *Martin v. Mott*, 12 Wheat. 19.

action of replevin, estops the plaintiff from denying that the taxes are legal.¹

§ 344. **May tender the legal tax and bring replevin.** Where goods are seized by a tax collector, and the owner tenders the legal amount of tax and keeps that tender good, he may replevy the goods.² But this is contrary to the general rule laid down in tax cases. Where property was taken for a tax, and defendant paid what he claimed was the tax, and cost, and replevied, *held*, it was proper to render judgment against him for the difference between what he had paid and the amount found due by the jury only.³

§ 345. **Property must be seized by officer in his own district, or replevin will lie.** Where an officer goes outside of his district and seizes property, of course his act is as a private individual, and replevin will lie. The seizure should be by an officer who is, at least, an officer *de facto*, at the time and place where the seizure is made.⁴ A plaintiff's wagon was seized for a school tax. The facts were that after the tax was levied a new school district was created, and plaintiff resided in the new district and claimed that the seizure by the secretary of the old district within the limits of the new was illegal; *held*, that the tax was no lien until seizure, and that the seizure in this case was unauthorized and illegal—that there must be some color of authority for the seizure. An officer without his bailiwick is without authority, and his seizure by distress for a tax is illegal.⁵ But, of course, the warrant of collection could be sent to the proper officer of the new district, if the statute permits it, which it usually does.

§ 346. **The illegality of the corporation no ground for**

¹ Busby v. Noland, 39 Ind. 234.

² Miller v. McGelm, 60 Miss. 903.

³ Ryan-Ream Cattle Co. v. Slaughter (Utah), 21 P. 997.

⁴ Martin v. Mott, 12 Wheat. 19.

⁵ McKay v. Batchellor, 2 Col. 591. See Marford v. Unger, 8 Iowa, 82; Wright v. Briggs, 2 Hill, 77; Hudler v. Golden, 36 N. Y. 446, and *per contra* Styles v. Griffith, 3 Yates, 82; People v. Albany, 7 Wend. 484; Mt. Carbon Co. v. Andrews, 53 Ill. 176.

replevin—Writ must be executed by a regular officer. The title of the officer cannot be adjudicated in a replevin action. It is sufficient if he be either *de jure* or *de facto* collector; neither can the validity of the corporation be determined in such an action, and the plea of *nul tiel corporation* is bad on demurrer, nor can the validity of the tax be questioned in such proceeding.¹ The officer must at least assume to act by due authority. Where, on the trial of a replevin suit for property seized by a town treasurer, for the satisfaction of taxes assessed against plaintiff, it appears that the property is rightfully assessed in defendant's township, and was held under tax process valid upon its face, replevin will not lie.² In replevin for property held by a village marshal for taxes, under a tax warrant duly issued upon an assessment properly and regularly made, the validity of the organization of the village, or the constitutionality of its charter cannot be raised.³

§ 347. **No other remedy is prohibited,** the object of the law being not to deprive the plaintiff of his day in court, but to protect the ingathering of the public revenue. The tax-payer who claims that he has been wronged by the seizure of his property may sue the officer in trespass or any other proper form of action. He is liable on his bond the same as a sheriff or other officer, and the value of the goods and damages for the taking, and detention, and costs, may be recovered.⁴ Where a tax levy inflicts an injury cognizable by law, the injured party must seek redress otherwise than by replevin for the property taken. The levy cannot be defeated by a mere claim that the tax is invalid, if it is apparently regular.⁵

¹ Mt. Carbon C. & R. Co. v. Andrews, 53 Ill. 177; McClaughy v. Cratzenberg, 39 Ill. 117.

² Hood v. Judkins, 61 Mich. 577 (28 N. W. 689).

³ Coe v. Gregory, 53 Mich. 19 (18 N. W. 541).

⁴ Cardinal v. Smith, Deady (C. C.), 197; Ware v. Percival, 61 Me. 391; Dow v. Sudbury, 5 Met. 73; Shaw v. Becket, 7 Cush. 442; People v. Supervisors of Chenango, 11 N. Y. 563; Supervisors, &c., v. Manny, 56 Ill. 161; Lanman v. Des Moines, 29 Iowa, 310.

⁵ Hill v. Wright, 49 Mich. 229 (13 N. W. 528).

CHAPTER XV.

REPLEVIN OF IMPOUNDED ANIMALS.

Section.	Section
Replevin does not lie for impounded or distrained animals if the proceeding is regular 348	replevin for mere irregularities if taken <i>damage feasant</i> 351
The same—Illustrations . 349	Where the statute gives a special remedy for testing the legality of the distraint, replevin will not lie . . 352
If the distrainer lose possession, his lien is lost . . 350	
Impounded cattle cannot be	

§ 348. **Replevin does not lie for impounded or distrained animals, if the proceeding is regular.** If the proceeding is regular, the property impounded or distrained is regarded as in the custody of the law and cannot be replevied. This does not preclude the owner from testing the legality of the procedure. If regular, the lien of the impounder is merely suspended during the attempt to replevy. Or, if the owner admit the regularity of the proceeding, but disputes the amount claimed as damage or rent, as the case may be, he can tender the correct amount and demand the property, and, on a refusal, bring replevin, and thus try this issue. If he tendered sufficient, he will get the property; otherwise not. If the property so impounded get away from the impounder in any manner, he loses his lien and cannot retake them; or if he confine them in a place other than that provided by law, replevin will lie. In other words, the lien is statutory, and the statute must be followed strictly.¹

§ 349. **The same—Illustrations.** The owner of distrained animals may maintain replevin after tender of payment of damages as fixed by appraisers,² or claimed by the

¹ *Bills v. Kinson*, 1 Frost (21 N. H.), 449; *Cate v. Cate*, 44 N. H. 211.

² *Anderson v. Worley*, 104 Ind. 165 (3 N. E. 817).

one taking them up,¹ or if appraisers find no damage.² Animals seized under the highway act cannot be replevied by the owner if the proceeding is regular.³ If one who attempts to distrain animals does not proceed lawfully, the detention is unauthorized, and the owner may replevy them.⁴ Possessory warrant will not lie for animals impounded under a village ordinance.⁵ Replevin will lie for animals distrained illegally, and the legality of the distraint may be determined in the replevin suit.⁶ Replevin will not lie for an animal detained by one who has taken it *damage feasant*. If the damages claimed are excessive, he must have them assessed under the statute.⁷ Where defendant in replevin for impounded cattle does not dispute title, but only claims a lien, he is not entitled, on failure of the action in replevin, to any larger recovery besides his costs.⁸ The owner of cattle taken up in accordance with law must make demand and offer to pay legal charges before he can maintain replevin.⁹ An owner of an animal impounded for trespass cannot maintain replevin until he has proved property and tendered the damage under the impounding law.¹⁰ A writ of replevin against the impounder of swine lawfully impounded cannot be sustained when the pound-keeper, without the knowledge of the impounder, has been tendered the damages and refused to surrender the swine.¹¹ An action of replevin will lie for distrained animals if the fence through which they broke was not a lawful

¹ Jones v. Clouser, 114 Ind. 387 (16 N. E. 797).

² Osgood v. Green, 33 N. H. 318.

³ Cropsy v. Perry, 1 How. Pr. (U. S.) 40. See Johnson v. Wing, 3 Mich. 163.

⁴ Armbruster v. Wilson, 43 Hun. N. Y. 261; Brown v. Smith, 1 N. H. 36; Morse v. Reed, 28 Me. 481.

⁵ King v. Ford, 70 Ga. 628.

⁶ Syford v. Shriver, 61 Iowa, 155 (16 N. W. 56).

⁷ Norton v. Rockey, 46 Mich. 460 (9 N. W. 492).

⁸ Marx v. Woodruff, 50 Mich. 361 (15 N. W. 510).

⁹ Holcomb v. Davis, 56 Ill. 413.

¹⁰ Phelan v. Bonham, 9 Ark. 389.

¹¹ Hall v. Hall, 12 Conn. 358.

fence.¹ In an action of replevin to recover certain hogs that had been taken *damage feasant*, it was *held*, that upon tender and demand the plaintiff became entitled to possession of the hogs, and that the tender was kept good by depositing the amount due for damages with the justice.²

§ 350. **If the distrainer lose possession, his lien is lost.** Where cattle had been distrained without authority of law, and the owner retook them with force, *held*, that replevin would not lie by the distrainer.³ But if the owner recapture them unlawfully, he has been allowed to replevy them.⁴

§ 351. **Impounded cattle cannot be replevied.**⁵ In New York it has been *held* to not lie for beasts taken *damage feasant*, even if the distrainer has failed to have the damage assessed within the time limited by statute.⁶ Where A took up B's stock *damage feasant*, B tendered the amount of the damage, which A refused, demanding an additional sum, but shortly thereafter notified B that he would accept that sum, and, notwithstanding, replevied the stock, *held*, that replevin would not lie.⁷ Where the animals are taken in the actual act of trespass, the law implies some damage, and will look over slight irregularities in the proceeding. In Michigan, in case of non-suit in replevin of a distress, the defendant may have an assessment covering every claim arising out of the distress and damages done him by the beasts.⁸

§ 352. **Where the statute gives a special remedy for testing the legality of the distraint, replevin will not lie.** In Michigan, by special statute, stock distrained may be re-

¹ Clark v. Stipp, 75 Ind. 114; Blizzard v. Walker, 32 Ind. 437.

² Nelson v. Smith, 26 Ill. App. 57.

³ Taylor v. Welby, 36 Wis. 42.

⁴ Ford v. Ford, 3 Wis. 399; Morse v. Reed, 28 Me. 481; Barnes v. Tannehill, 7 Blackf. 606; Bayless v. Lefaiivre, 37 Mo. 119; Hendricks v. Decker, 35 Barb. 298.

⁵ Johnson v. Wing, 3 Mich. 163.

⁶ Cresson v. Stout, 17 Johns. (N. Y.) 116.

⁷ Allen v. Van Ostrand, 19 Neb. 579 (27 N. W. 642).

⁸ Sterner v. Hodgson, 63 Mich. 419 (30 N. W. 77), How. Stat. § 8375.

plevied to test the validity of the distraint, but to do this the plaintiff must proceed under the special law, and not under the general law of replevin.¹

¹ *Campan v. Konon*, 39 Mich. 362.

CHAPTER XVI.

THINGS WHICH MAY BE REAL OR PERSONAL PROPERTY
ACCORDING TO CIRCUMSTANCES.

	Section.		Section.
General rule in regard to houses, trees, crops, grass, and other property which may be either real or per- sonal property according to circumstances	353	owner while in possession— not after	366
When maintainable for prop- erty severed from the realty	354	The landlord's right to those fixtures originated in an im- plied gift	367
Timber cut on land sold for taxes	355	Fixtures part of the realty— Illustrations	368
A growing crop passes with a judicial sale of realty	356	Fixtures severed from the realty become personal property	369
Crops growing on mortgaged land are covered by the mortgage	357	Trade fixtures	370
A purchaser at a foreclosure sale cannot, before the sale is confirmed, replevy the crop	358	The same	371
The general rule	359	Personalty—Where attached to land without owner's con- sent	372
Mortgagee cannot maintain replevin for property severed before he took possession . . .	360	A building or other fixture placed on the land of an- other with his consent is personal property	373
Where title is in litigation— Effect on crops	361	Cannot be maintained for timber severed from the free- hold by an adverse claim- ant	374
Right of mortgagee to re- plevy house removed unlaw- fully	362	The same, and other property	375
When buildings are replevia- ble	363	Proof necessary—Title—What is adverse possession	376
The same	364	Replevin does not lie by one of two claimants of govern- ment land for the crops raised or grass cut by an- other claimant	377
Where the intention of the par- ties make a building person- alty	365	Where a person claiming to own the land severs chat- tels	378
Fixtures may be removed by		Property severed under con-	

	Section.		Section.
tract of sale can be replevied		The same in case of trespasser	383
by the vendee, not by the		Owner may replevy property	
vendor	379	illegally severed by a tenant	384
But where nothing was paid		Actual severance not necessary	385
for the land and timber was		Chattels severed by mistake .	386
fraudulently sold, the owner		Rights of the holder of a color-	
can replevy	380	able title merely	387
In cases of disseizin	381	Instances	388
Chattels severed from realty .	382		

§ 353. **General rule in regard to houses, trees, crops, grass, and other property which may be real or personal property, according to circumstances.** It is not the province of this work to enter into a discussion of what is or what is not real estate. Under the authorities it is allowable in a replevin action to examine into the title of the real estate, where the title to the chattel depends upon the title to the real estate, just far enough to determine whether or not there are adverse claimants to the real estate. If there are, the validity of their claims cannot be tried in the replevin action; but if there are not adverse claimants to the realty, the title may be shown in the replevin action for the purpose above stated. "So much depends on the situation and nature of the "property, the uses to which it can be applied, or to which "the owner or claimant may choose to apply it, that it is "difficult to lay down any precise rule adapted to all cases."¹ In the following pages I have endeavored to classify the decisions as well as the dissimilarity of the circumstances out of which they arose will permit, without much effort at logical order.

§ 354. **When maintainable for property severed from the realty.** The action for the recovery of specific chattels is founded upon the right of property, and to maintain it the plaintiff must show that he is the owner of the property claimed, or that it has been wrongfully taken from his possession by the defendant. It is well settled that it lies for

¹ Ewing v. Burnet, 11 Pet. 41.

things which were a part of the realty, but which have been severed therefrom by the wrongdoer and converted to his use. The owner of the land does not lose his title by the severance, but his ownership attaches to the property in its changed character, and it vests in him as a chattel interest, and he can pursue it by the ordinary remedies given by law to the owner of personal property. It is an incident to the right to the realty that the owner may claim the severed property. A claimant whose only claim to the property severed rests upon his interest in the land from which it was taken must show that he was in the actual or constructive possession of the land when the severance occurred. Where the land is wild, uninclosed, the plaintiff must show a good legal title, as constructive possession follows the legal title.¹

§ 355. **Timber cut on land sold for taxes.** The original owner of land sold to pay taxes cannot maintain replevin for timber cut by the purchaser between the time of sale and redemption.²

§ 356. **A growing crop passes with a judicial sale of realty,** and the purchaser can maintain replevin for the crop, corn ungathered.³ He who is in possession of and cultivates a piece of land and harvests a crop grown thereon, and severs the same from the soil, cannot be dispossessed of said crop by the owner of the land in an action of replevin.⁴ But where, after ejectment, the unsuccessful party or a member of his family enters upon the land without permission and sows

¹ *Johnson v. Elwood*, 53 N. Y. 431; *Cresson v. Stout*, 17 J. R. 116; *Schermerhorn v. Buell*, 4 Den. 422; *Moody v. Whitney*, 34 Me. 563; *Riley v. Boston Water Power*, 11 Cush. 11.

² *Cromeline v. Brink*, 29 Pa. St. 522.

³ *Salmon v. Fewell*, 17 Mo. App. 118; *Garth v. Caldwell*, 72 Mo. 627; *Scriven v. Moote*, 46 Mich. 66; *Hecht v. Dettman*, 56 Iowa, 679; *Jones on Mortgages*, § 780, 697; *Shepard v. Philbrick*, 2 Denio, 175; *Steele v. Farber*, 37 Mo. 80; *Howell v. Skink*, 4 Zab. (N. J.) 92; *Downard v. Groff*, 40 Iowa, 597; *Crews v. Pendleton*, 1 Leigh. 305; *Ling v. King*, 8 Wend. 585; *Anderson v. Strauss*, 98 Ill. 490; *Jones v. Thomas*, 8 Blackf. 428; *Aldrich v. Reynolds*, 1 Barb. Ch. 615; *Hall v. Durham* (Ind.), 20 N. E. 282.

⁴ *McAllister v. Lawler*, 32 Mo. App. 91; *Renick v. Boyd*, 99 Pa. 555.

a crop on the land, and, after ouster under the execution in ejectment, cut and stack the crop on the land, the crop passes with the land, and the judgment owner may maintain replevin for the crop.¹

§ 357. It is a well settled rule of law that crops growing on mortgaged land are covered by the mortgage, whether planted before or after its execution, and until they are severed the mortgage attaches as well to the crops as to the land; and if the land be sold for condition broken before severance, the purchaser is entitled to the growing crops, not only as against the mortgagor, but against all persons claiming in any manner through or under him, subsequent to the recording of the mortgage.² And whenever this right is interfered with he may maintain replevin for the crop.³ But where the tenant was in rightful possession at time of sale, and the purchaser suffer him to remain and to harvest the crops then growing, he cannot maintain replevin for the grain.⁴ Where trees were severed from the realty before the purchaser under a foreclosure sale was entitled to possession, he was not allowed to maintain replevin for their recovery.⁵

§ 358. A purchaser at a foreclosure sale cannot, before the sale is confirmed and before he has acquired possession of the land, maintain replevin for crops growing thereon at the time of sale, but afterwards severed therefrom by the person in possession of the land.⁶ A purchaser of land at sheriff's sale under a decree of foreclosure, upon receiving

¹ Oyster v. Oyster, 32 Mo. App. 270.

² Rankin v. Kinney, 7 Bradw. 215; Harman v. Fisher, 9 Bradw. 22; Lugden v. Beasby, 9 Bradw. 71; Anderson v. Straub, 98 Ill. 485; Jones v. Thomas, 8 Blackford, 428; Jones on Mortgages, § 676, 699, 780; Washburn's Real Prop. 106.

³ Yates v. Smith, 11 Bradw. 459; Waterman v. Matteson, 4 R. I. 539; Wiltsie on Mortgage Foreclosure, § 587.

⁴ Bowen v. Roach, 78 Ind. 361.

⁵ Berthold v. Holman, 12 Minn. 335.

⁶ Woehler v. Endter, 46 Wis. 301; Wiltsie on Mortgage Foreclosure, § 587.

a deed, becomes entitled to the immediate possession of the premises, and crops thereafter sown and harvested by the mortgagor or his lessee, without the purchaser's consent, belong to the latter, and he may maintain replevin therefor, without first making a demand.¹

§ 359. **The general rule.** As a general rule in states where the mortgage is by law regarded as an absolute conveyance of the land, with a condition of defeasance on payment of the debt, chattels severed from the realty before discharge of the mortgage are the property of the mortgagee, and, of course, he may replevy them. But when the mortgage is regarded as a security only, and the legal title of the property still remains in the mortgagor, chattels severed belong to the mortgagor until default or condition broken, or, in some instances, until foreclosure.²

§ 360. **Mortgagee cannot maintain replevin for property severed before he took possession.** A mortgagee of real estate, whose debt is due, but who has not entered into possession, cannot maintain replevin for a specific chattel which the mortgagor or his assigns has severed and removed from the realty, and which, before severance, was a fixture or part of the realty, and subject to the mortgage.³

¹ Hall v. Durham, 117 Ind. 429 (20 N. E. 282). This is the well settled rule where the mortgage is regarded, as it now generally is, as conveying no title, but a lien merely until after foreclosure.

² Adams v. Corrison, 7 Minn. 456; Smith v. Goodwin, 2 Me. 173; Hemenway v. Bassett, 13 Grey, 378; Brotton v. Clawson, 2 Strobb. (S. C.) 478; Fernald v. Linscott, 6 Me. 234; Bussey v. Page, 14 Me. 132; Frothingham v. McKusick, 24 Me. 405; Gore v. Jenness, 19 Me. 53; Roberts v. Dauphin Bank, 19 Pa. St. 75; Cope v. Romeyne, 4 McLean, 384; Latham v. Blakely, 70 N. C. 368; Gray v. Holdship, 17 S. & R. 413; Goff v. O'Conner, 16 Ill. 421; Sanders v. Reed, 12 N. H. 561; Thomas v. Crofut, 14 N. Y. 474; Van Pelt v. McGraw, 4 Comst. 111; Waterman v. Matteson, 1 Ames (4 R. I.), 540; Langdon v. Paul, 22 Vt. 210; Lull v. Matthews, 19 Vt. 322; Morey v. McGuire, 4 Vt. 327; Clark v. Reyburn, 1 Kan. 281; Northampton Paper Mills v. Ames, 8 Met. 1; Yates v. Joyce, 11 Johns. 136; Jackson v. Bronson, 19 Johns. 326; Hatch v. Dwight, 17 Mass. 299; Gardner v. Heartt, 3 Denio, 233; Luha v. Holt, 5 Hawaiian, 182.

³ Kircher v. Schalk, 39 N. J. 335. See Luha v. Holt, 5 Hawaiian, 182.

Trees cut on mortgaged land without the consent of the mortgagee may be taken possession of by the mortgagee, and replevin will not lie against him by the mortgagor or the one who wrongfully cut them, or any one claiming under him.¹

§ 361. **Where the title is in litigation, effect on crop.** Where the title or possession of land is in litigation, and a person with full knowledge puts in a crop, the crop will go with the land and replevin will lie for it by the one entitled to the possession of the land, even after it is harvested.² A crop of wheat cut and removed by defendant may be replevied by the one in possession of the land.³ When a tenant rents land from one against whom a suit in ejectment is pending, of which the tenant has notice, and the suit is determined against his landlord, the growing crops pass with the soil, and the party recovering in ejectment may recover them in replevin even after they are harvested.⁴ Replevin will lie for corn gathered by one of two claimants of the land on which grown, in favor of the one who planted and cultivated it.⁵

§ 362. **Right of mortgagee to replevy house removed unlawfully.** Where a house has been severed from mortgaged premises without the consent of the mortgagee, he may maintain replevin at any time before it becomes attached to and forms a part of other realty; and if the building is afterward severed from the realty, before his mortgage is satisfied, he may regain it by the action of replevin.⁶

§ 363. **When buildings are repleviable.** A building placed upon the land of another under an agreement for a con-

¹ Mosher v. Vehue, 77 Me. 169.

² Samson v. Rose, 65 N. Y. 411. The court discuss the doctrine of emblements quite fully in this opinion.

³ Conner v. Bludworth, 54 Cal. 635.

⁴ Rowell v. Klein, 44 Ind. 290.

⁵ Kenney v. Degman, 12 Neb. 237 (11. N. W. 318).

⁶ Dorr v. Dudderar, 88 Ill. 107; Matzon v. Griffin, 78 Ill. 477; Salter v. Sample, 74 Ill. 430.

veyance of the land, which agreement is broken by the owner of the land, may be replevied.¹ A frame building erected upon and attached to the realty and used as a tannery is not repleviable.² In California a building which was placed on blocks not in any way attached to the soil was regarded as personal property.³ A party bought a lot, making but a small payment thereon, and built a house on it. After several installments of the purchase money were overdue and unpaid, he moved the house off. The owner of the ground demanded it as personal property and replevied it. It was held the action was proper and could be sustained so long as the house was not permanently attached to other realty.⁴

§ 364. **The same.** Buildings while fixed are ordinarily part of the realty, and dwelling-houses and such buildings are *prima facie* real estate, and cannot be replevied.⁵ They are never considered as fixtures in the ordinary meaning of that term,⁶ and ordinarily heavy machinery, as that of a mill or factory, is regarded as real estate.⁷ But if it was clearly the intention of the parties to regard it as personal property when the same was placed thereon, it will be so regarded by the law, and replevin will lie by the owner.⁸ Property ordinarily real estate may by the agreement of the parties

¹ Commissioner's Rush Co. v. Stubbs, 25 Kan. 322.

² Eddy v. Hall, 5 Col. 576. The court takes the ground that the building could not become personalty until severed from the ground, no matter what the agreement of the parties in regard to it, and cite Claflin v. Carpenter, 4 Met. 580, and Lawson v. Patch, 5 Allen, 586.

³ Pennybecker v. McDougal, 48 Cal. 162; Mills v. Redick, 1 Neb. 437.

⁴ Ogden v. Stock, 34 Ill. 522; Salter v. Sample, 71 Ill. 432.

⁵ Davis v. Taylor, 41 Ill. 405; Meyers v. Schemp, 67 Ill. 469; Chatterton v. Saul, 16 Ill. 151; Madigan v. McCarthy, 108 Mass. 376; Smith v. Benson, 1 Hill (N. Y.), 176; Vause v. Russell, 2 McCord (S. C.), 329.

⁶ Goff v. O'Conner, 16 Ill. 423.

⁷ Harlan v. Harlan, 15 Pa. St. 513.

⁸ Salter v. Sample, 71 Ill. 431; Fahnestock v. Gilham, 77 Ill. 637; Dooley v. Crist, 25 Ill. 551; Doty v. Gorham, 5 Pick. 487; Ashmun v. Williams, 8 Pick. 402; Wells v. Bannister, 4 Mass. 514; Ricker v. Kelley, 1 Gr. (Me.) 117; Yale v. Seely, 15 Vt. 221; Beers v. St. John, 16 Conn. 322; Nalor v. Collinge, 1 Taunt. 19; Mansfield v. Blackburn, 6 Bing. 426.

become personalty without actual severance, and as such subject to replevin.¹ Replevin does not lie for property fixed to the freehold, but if, after the sheriff has levied on it, it is severed, it becomes personal property, and may be replevied.² Where a contractor had prepared timbers for a house he was building, and they were removed temporarily to an adjoining house, and there levied upon on a writ against him, the employer, owner of the house, was not allowed to replevy the timbers as part of the house.³ Replevin will not lie to oust a tenant from the occupancy of a building.⁴ Replevin will lie to recover the possession of a building erected on a lot of ground by a party claiming title thereto, who by judicial determination has been evicted therefrom, if the building were not at the time of the eviction affixed to the soil, although another person, being afterward in possession, had moved it and affixed it to the soil.⁵ A house fraudulently removed may be replevied by the owner.⁶

§ 365. **Where the intentions of the parties make a building personalty**, neither the manner of its annexation to the land nor any other matter will prevent this intention from being carried out, and replevin will lie for a building under such circumstances, though on a permanent foundation.⁷

§ 366. **Fixtures may be removed by owner while in possession—not after.** It is undoubtedly the settled rule of law that, where a tenant has the right to remove fixtures, he must exercise his right during the continuance of his term, or before he surrenders the possession of the premises. He cannot re-enter for such purpose.⁸

¹ *Shell v. Haywood*, 16 Pa. St. 527; *Piper v. Martin*, 8 Barr. (Pa.) 211.

² *Cresson v. Stout*, 17 Johns. (N. Y.) 116.

³ *Johnson v. Hunt*, 11 Wend. (N. Y.) 137.

⁴ *McCormick v. Riewe*, 14 Neb. 509 (16 N. W. 832); *Riewe v. McCormick*, 11 Neb. 261 (9 N. W. 88).

⁵ *Mills v. Redick*, 1 Neb. 437.

⁶ *Crum v. Hill*, 40 Iowa, 506.

⁷ *Waters v. Reuber*, 16 Neb. 106 (19 N. W. 687); *Rush Co. v. Subbs*, 25 Kan. 322.

⁸ *Torrey v. Burnett*, 9 Vroom (38 N. J. L.), 459—a leading case;

§ 367. **The landlord's right to these fixtures originated in an implied gift** on the part of the tenant, such implication arising from the fact that the tenant, at the end of his term, abandoned the property without removing them. And if it is shown that the landlord consented to allow the fixtures to remain for a certain time, even by implication, this would overcome the implication of an abandonment by the tenant, and probably the same rule would be followed where the tenant, on leaving, notified his landlord that he would return for the fixtures not yet removed by him.¹

§ 368. **Fixture part of the realty—Illustrations.** A wooden half partition, nailed at the ends to blocks let through the plastering, and at the bottom to a strip of board nailed to the floor, put up by the tenant by the landlord's consent and sold to him afterwards, is a fixture, and not subject to levy as personalty, nor to replevin as goods and chattels.² It will not lie to recover possession of houses that had been erected upon posts, and afterward removed from land against which the plaintiff had enforced a mechanic's lien for the indebtedness of one who had only an equitable interest in the premises.³ Replevin will lie for fixtures in the basement of a building, and plaintiff cannot be restrained by injunction from asserting his right in that way.⁴ It is a fundamental rule that all improvements or additions placed upon land, of a permanent nature, adapted to its use and better enjoyment, become a part of the land. If a house be built

Elves v. Mawe, 2 Smith's Lead. Cas. 228 and note, Year Book 20 Henry VII.; *Poole's Cases*, 1 Salk. 368; *Penton v. Robart*, 2 East. 88; *Josslyn v. McCabe*, 46 Wis. 591; *Keog v. Daniel*, 12 Wis. 164.

¹ *Torrey v. Burnett*, 9 Vroom (38 N. J. L.), 459. See *Marston v. Roe*, 8 A. & E. 59. See *Charlotte Furnace Co. v. Stouffer* (Pa.), 17 A. 994.

² *McAuliffe v. Mann*, 37 Mich. 539. On the general proposition, see *O'Brien v. Kusterer*, 27 Mich. 289; *Guthrie v. Jones*, 108 Mass. 191; *Brown v. Wallis*, 115 Mass. 156.

³ *Wagar v. Briscoe*, 38 Mich. 587. See *Ewell on Fixtures*, 414-17; *Eggleston on Dam.* 292.

⁴ *Hamilton v. Stewart*, 59 Ill. 330.

upon land with the intention of attaching it to the land permanently, it becomes a part of the realty, and replevin will not lie; but where the owner detached such a house from the land and moved it to another lot, while in transit it would be personal property, and replevin would lie therefor.¹

§ 369. **Fixtures severed from the realty become personal property** and are subject to replevin as though never attached to the soil.² Where two persons leased land for a salt well on shares, and petroleum came up with the salt water, which they saved and sold, and the owner of the land sued in trover, the court held that only the salt was granted, and everything else not mentioned reserved, but that, as the lessees could not run the salt water without the petroleum, that the severance of the petroleum from the real estate was inevitable and lawful, that trover would not lie, that equity alone could give relief.³ When one built a mill on the land of another under an agreement that it was to be the property of the builder until a certain judgment should be paid, which was not paid, but the land with the mill thereon was sold on execution, the mill was *held* to be the personal property of the builder.⁴ Where a person purchased a mill at sheriff's sale, and the *real estate only* was sold, and another person claimed the machinery and severed and took it, with the knowledge of the purchaser at the sheriff's sale, who afterwards brought replevin, claiming it as part of the real estate, the purchaser was allowed by the court to show that it was in fact part of the real estate, and that it was in fact sold by the sheriff with the realty and bought by him, and upon making such proof he was

¹ *Salter v. Sample*, 71 Ill. 430; *Ogden v. Stock*, 34 Ill. 522; *Dooley v. Crist*, 25 Ill. 551; *Ewell on Fixtures*, 414-17.

² *Brown v. Caldwell*, 10 S. & R. 118; *Heaton v. Findlay*, 12 Pa. St. 304; *Mather v. Trinity Church*, 3 S. & R. 509. See *Salter v. Sample*, 71 Ill. 431; *Pyle v. Pennock*, 2 Watts and Serg. 290; *Voorhis v. Freeman*, 2 Watts and Serg. 116; *Baker v. Howell*, 6 S. & R. 476.

³ *Kier v. Peterson*, 41 Pa. St. 358.

⁴ *Yater v. Mullen*, 24 Ind. 277.

allowed to sustain replevin against the party who wrongfully severed it.¹ Replevin lies for mill machinery severed from the real estate.² Replevin will lie for such articles as mills, barns, steam engines, offices, and sheds. Such articles may or may not be fixtures, and whether they are or not is a matter of evidence unnecessary to be stated in pleading.³

§ 370. **Trade fixtures.** Replevin will not lie for a counting-room built in a store-room; it is part of the realty.⁴ Mere utensils or machines, or other articles of a similar nature, being themselves of a chattel nature and capable of being detached without material injury to the freehold or to themselves, and of being set up and used elsewhere, are removable by the tenant or his vendee during his term. On the other hand, there may be annexations made by a tenant occupying premises for trade purposes of so intimate and permanent a character as to furnish satisfactory evidence that the annexations were intended to be permanent accessions to the realty. In the first case, replevin would lie; in the latter, it would not lie.⁵ The principle laid down by these cases is that where the fixture or other thing is attached to the land with the intention of making it a part thereof, it belongs to the land, and replevin will not lie; but where the intention of the parties is to not so attach it, and that it shall remain personal property, it is personal property, and replevin will lie for it.

§ 371. **The same.** And the right to bring replevin and

¹ *Harlan v. Harlan*, 15 Pa. St. 513; *Heaton v. Findlay*, 12 Pa. St. 304.

² *Cresson v. Stout*, 17 Johns. 116. For a contrary view, see *Powell v. Smith*, 2 Watts (Pa.), 261.

³ *Brearily v. Cox*, 24 N. J. L. (4 Zab.) 287; *Kirch v. Davis*, 55 Wis. 287 (11 N. W. 689).

⁴ *Brown v. Wallis*, 115 Mass. 156. See *Guthrie v. Jones*, 108 Mass. 191; *Neblet v. Smith*, 4 T. R. 504; *Cresson v. Stout*, 17 Johns. 116; *Hanrahan v. O'Reilly*, 102 Mass. 201; *Bliss v. Whitney*, 9 Allen, 114; *Cong. Soc. v. Fleming*, 11 Iowa, 533.

⁵ *Ewell on Fixtures*, pp. 91-3.

thus have the character of the fixtures judicially determined as to whether they were attached to the realty or were not intended to be so attached cannot be restrained by injunction.¹ In the case of a frame dwelling, the court say that the action of replevin should not be dismissed until the court could first determine from the evidence whether it was real or personal property.² So it was held no cause for demurrer to a declaration in replevin that the action was for a shingle mill office building and barn. They might be real estate, and they might be personal property. This was the very question in issue, and could only be determined after hearing all the facts brought out at the trial.³ Replevin lies for trade fixtures wrongfully detached and removed, such as shafting, pulleys, belting, etc.⁴

§ 372. **Personalty—where attached to land without owner's consent.** An owner of personal property cannot, against his will, be deprived of his property by having it attached to the real estate of another, without his consent, by a third party, and may bring replevin for his property so attached.⁵ Where a house which is a chattel, and belongs to

¹ *Hamilton v. Stewart*, 59 Ill. 331. This was an action to restrain a party from entering upon certain real estate and removing an ice box, counter, and shelving, etc., used in the business he had carried on there.

² *Elliott v. Black*, 45 Mo. 373.

³ See *Briarly v. Cox*, 4 Zab. (24 N. J.) 287, and *Reynolds v. Schuler*, 5 Cow. 323; *Goodrich v. Jones*, 2 Hill, 142; *Fahnestock v. Gilham*, 77 Ill. 637; *Guthrie v. Jones*, 108 Mass. 193; *Hanrahan v. O'Reilly*, 102 Mass. 201.

⁴ *Kirch v. Davis*, 55 Wis. 287, 11 N. W. 689. An inclined plane for loading coal may be replevied. *Charlotte, &c., v. Stouffer* (Pa.), 17 A. 994.

⁵ *Shoemaker v. Simpson*, 16 Kan. 43. In this case railroad iron was taken by a railroad company without consent of owner, and used in laying a temporary track across a stranger's land, spiking it down to cross-ties. The owner of the land claimed it as a part of the realty. On this subject see *Haven v. Emery*, 33 N. H. 66; *Dame v. Dame*, 38 N. H. 429; *Hunt v. Bay State Iron Co.*, 97 Mass. 279; *Wagner v. C. & T. R. R. Co.*, 22 Ohio St. 563; *Hines v. Ament*, 43 Mo. 298; *Fuller v. Tabor*, 39 Me. 519. Where the intent of the parties is held to govern—where the property was taken without the knowledge of the owner, of course his consent

A, is wrongfully removed and placed by B upon a stone foundation upon his land with the intention of converting it to his own use, A may bring replevin for the house.¹ A building set upon blocks resting on the ground is personal property, and replevin lies to recover it. A portable fence made of posts and boards, and resting on the surface, is personal property, and may be replevied.² Where the owner of chattels fixes them to the real estate of another without his consent, they become a part of that real estate, and cannot be taken by replevin; and if one acquire possession of his neighbor's chattels and fix them to his own land, so that they are a part of the real estate, they cannot be retaken by replevin, the remedy being to sue in conversion.³ A building placed on the land of another by mistake, without the owner's consent or knowledge, would be personal property and liable for the debts of the builder.⁴

§ 373. **A building or other fixture placed on the land of another with his consent, with the intention of removal, is personal property, and may be replevied by the owner thereof.**⁵ Where a fence was built upon the land of another

will not be presumed—*Conklin v. Parsons*, 1 Chandler, 240, and other cases which lay down the rule that personal property thus attached to the real estate cannot be replevied by the owner, all seem to rely upon *Sparks v. Spicer* (Mich. 10 Will. III.), 1 Lord Raymond, 738. This case was decided 192 years ago, and reads as follows: "If a man be hung in 'chains upon my land, after the body is consumed I shall have gibbet 'and chain.'" The sooner a rule of law resting upon such a foundation is changed, the better for the credit of our judicial system.

¹ *Central R. R. Co. v. Fritz*, 20 Kan. 430.

² *Pennybecker v. McDougal*, 48 Cal. 160. In this case, plaintiff settled upon a piece of public land, but the patent was issued to another, and he brought replevin for his cabin and fence, and it was held that, as they were not attached to the soil, the United States had no interest in them, and would convey no title to them by its patent.

³ *Fryatt v. The Sullivan Co.*, 5 Hill (N. Y.), 117.

⁴ *Pennybecker v. McDougal*, 48 Cal. 162. In this case the owner of the land made no objection to the proceedings by the creditors to subject the building to payment of their claims.

⁵ *Weathersby v. Sleeper*, 42 Miss. 732; *Foy v. Reddick*, 31 Ind. 414; *Russell v. Richards*, 10 Me. 429; *Ashmun v. Williams*, 8 Pick. 402; *Hines v. Ament*, 43 Mo. 300.

by mistake, and remained there for fifteen years with the consent of the owner of the land; the owner of the land then requested the owner of the fence to remove it, which he did not do, when the owner of the land took the fence away himself, claiming it as a part of the realty. The owner of the fence brought and was permitted to sustain replevin.¹

§ 374. **Cannot be maintained for timber severed from the freehold by an adverse claimant.** While the general rule is that when things which, in their natural state, form part of the freehold, are severed therefrom and converted into chattels, they belong to the owner of the land, mere changes in the form of such things, so long as the identity of the original material can be traced, not working a change of ownership, and he may maintain detinue for them, if they are removed from the freehold; yet, the law not permitting the title to land to be inquired into directly in personal actions, the owner of the freehold cannot maintain that action if he can show title to the things severed from it only by showing title to the land, and, at the time of the severance, he had not actual or constructive possession of the land, but it was then held and occupied adversely to him.²

§ 375. **The same, and other property.** Trees, while standing, are a part of the realty, but when severed become personal property of the person who owned and had the right of possession of the real property. He can maintain replevin for them unless they were so severed by one claim-

¹ *Hines v. Ament*, 43 Mo. 300. See also *Ring v. Billings*, 51 Ill. 475; *Gibbons v. Dillingham*, 5 Eng. (Ark.) 9; *Hensley v. Brodie*, 16 Ark. 511; but see *Vausse v. Russell*, 2 McCord (S. C.), 329.

² *Cooper v. Watson*, 73 Ala. 252; *Carpenter v. Lewis*, 6 Ala. 682; 1 *Smith's Lead. Cas.* (7 Ed.) 660; *Curtis v. Groat*, 6 Johns. 168; *Brown v. Sax*, 7 Cowen, 95; *Wright v. Guier*, 9 Watts, 172; *Mather v. Trinity Church*, 3 Serg. & R. (Pa.) 509; *Baker v. Howell*, 6 Id. 476; *Brown v. Caldwell*, 10 Id. 114; *Brothers v. Hurdle*, 10 Ired. (N. C. L.) 490; *Branch v. Morrison*, 5 Jones (Law), 16; *Harrison v. Hoff*, 102 N. C. 126 (8 S. E. 887); *Adkison v. Hardwick* (Col.), 21, P. 907.

ing adverse possession.¹ Grass cut from the freehold is personal property, and in an action for it the plaintiff need not show title to the land.² And where the owner of the land wrongfully cut trees thereon which, by agreement, belonged to another, the owner of the trees was allowed to maintain replevin for the trees so cut.³ And where timber was lawfully cut, but illegally sold before being paid for, replevin will lie by the owner of the land against the purchaser, but the measure of his damages is not the value of the timber cut, but the purchase price under the contract.⁴ Where one in possession claiming title to the land, with full knowledge of an adverse claim, and in defiance of a notice from the claimant, cuts bark from trees thereon, and in replevin executes a claim and delivery bond, the measure of damages is the value of the bark at the time and place where replevied.⁵

§ 376. **Proof necessary—Title—What is adverse possession.** In replevin for logs cut and removed by defendants from the land to which plaintiff claims title, proof that the plaintiff was in the actual possession and occupancy of the land at the time of such cutting and removal is sufficient to enable him to maintain the action, without proof of a paper title, unless the defendants proved an adverse title thereto of a higher character than a mere possessory title. But where the land was unoccupied when the logs were taken, plaintiff must show that he is the real owner, and trace his title to the government.⁶ Where a trespasser settled on timber land for the purpose of cutting the timber thereon, such settlement does not constitute him an adverse claimant, and the true owner may bring replevin for the logs and timber so cut.⁷

¹ Washburn v. Cutter, 17 Minn. 335; Richardson v. York, 2 Shep. (Me.) 216; Bower v. Higbee, 9 Mo. 260.

² Johnson v. Barber, 5 Gilm. (Ill.) 426.

³ Warren v. Leland, 2 Barb. (N. Y.) 613.

⁴ Lillie v. Dunbar, 62 Wis. 198 (22 N. W. 467).

⁵ Phillips v. Stroup (Pa.), 17 A. 220.

⁶ Hungerford v. Redford, 29 Wis. 345.

⁷ Austin v. Holt, 32 Wis. 478.

§ 377. Replevin does not lie by one of two claimants of government land for the crop raised by another. Replevin for hay cut on the public lands does not lie when the defendant is in adverse possession, under a claim of right by virtue of the preëmption laws. The title to land cannot be tried in this way.¹ An adverse claimant of government land cannot bring replevin for the crop raised on the land by one in possession and claiming the land also.² Hay cut on public land cannot be replevied by one of two claimants of the land.³

§ 378. Where a person claiming to own the land severs chattels. Where the land was in the actual possession of W. under a claim of right and adverse to plaintiff, who it was held had the title, he cut a quantity of grass and sold the hay to defendant, and plaintiff brought replevin against defendant, it was *held* that as W. was in possession under a claim of right he would be regarded as the owner until decreed otherwise, and that W. would convey a good title to the hay so sold.⁴ The courts have gone so far as to hold that where the defendant was in possession in good faith and severed property therefrom, the real owner could not maintain replevin therefor, basing it on the ground that the title to the land could not be settled in this way.⁵ Where there is no adverse possession, the owner of the land may always bring replevin, or he may always bring it against a trespasser.⁶ One who claims to be the owner of

¹ Page v. Fowler, 28 Cal. 605.

² Rathbone v. Boyd, 30 Kan. 485 (2 Pac. 664).

³ Page v. Fowler, 28 Cal. 605. But see Laurendan v. Fugelli (W. T.) 21 P. 29.

⁴ Stockwell v. Phelps, 34 N. Y. 363. See Mather v. Trinity Church, 3 S. & R. 509; Lehman v. Kellerman, 65 Pa. St. 489; Ralston v. Hughes, 13 Ill. 469.

⁵ Snyder v. Vaux, 2 Rawle (Pa.), 427; Harlan v. Harlan, 15 Pa. St. 513; DeMott v. Hagerman, 8 Cow. 219; Halleck v. Mixer, 16 Cal. 575; Page v. Fowler, 28 Cal. 608; Anderson v. Hopler, 34 Ill. 439.

⁶ Brewer v. Fleming, 51 Pa. St. 111; Saunders v. Reed, 12 N. H. 558; Langdon v. Paul, 22 Vt. 205; Sands v. Pfeiffer, 10 Cal. 258; Anderson v. Hopler, 34 Ill. 436; Vausse v. Russel, 2 McCord, 329.

land cannot maintain replevin for shock oats against one who sowed and harvested them, and who had been in possession of the land several years.¹ The true owner cannot maintain replevin for crops raised on his land by others who are holding the possession of the land adversely to him.² The remedy in such cases is by action of trespass for *mesne* profits.³

§ 379. **Property severed under contract of purchase of the land can be replevied by the vendee, not by the vendor.** The vendee of land under contract of sale is the proper one to maintain replevin for logs unlawfully cut on the land, not the vendor.⁴ If one who is rightfully in possession of land under a contract of sale after a default in payment, but, before any foreclosure of his equity, disposes of a house attached to such land, the vendor in the land contract, having no possessory title to the house, cannot maintain replevin or trover therefor.⁵

§ 380. **But where nothing was paid for the land and timber was fraudulently sold, the owner can replevy.** License to a grantee of land to cut and carry away the timber would not prevent the licensor from maintaining replevin against one who had purchased the timber from the licensee, where the latter had paid nothing for the land, and it was understood and agreed by all parties that ownership should remain in the licensor until payment.⁶

§ 381. **In cases of disseizin.** Where one disseizes the owner of land and cuts and removes the crop, replevin will not lie. The remedy is trespass.⁷ Where defendant was the

¹ Caldwell v. Custard, 7 Kan. 303.

² Pennybecker v. Dougal, 46 Cal. 661; Page v. Fowler, 39 Cal. 412.

³ Harrison v. Hoff, 102 N. C. 126 (8 S. E. 887). See Brothers v. Hurdle, 10 Ired. 490; Ray v. Gardner, 82 N. C. 454.

⁴ Martin v. Scofield, 41 Wis. 167.

⁵ Northrup v. Trask, 39 Wis. 515. The proper remedy is to enjoin the waste.

⁶ Ortman v. Lovereign, 42 Mich. 1 (3 N. W. 223):

⁷ DeMott v. Hagermann, 8 Cow. (N. Y.) 220; Rich v. Baker, 3 Den. (N. Y.) 79.

owner in fee of land of which the plaintiff in replevin had disseized him and sowed a crop, after which the defendant had re-entered and had possession of land and wheat, *held*, plaintiff could not maintain replevin.¹ Where plaintiff was in possession of 800 acres of land, but the fences were not well kept up, and several persons entered thereon, built houses, and attempted to preëempt it, but were defeated, and judgment of *ouster* rendered against them, but while they were in possession they cut and put up hay which plaintiff replevied, *held*, that the suit would not lie, that the owner of the land was out of possession, and the defendants in possession claiming to own it when they made the hay. The remedy of the owner was an action for the rents and profits, and not for the crops themselves or their value. It would be unjust and oppressive to the public to require them to examine the title to the real estate before buying the crops grown thereon.² Where a trespasser attached a building to land, and, after he had been evicted, tortiously removed the building, it became after such severance, and while in the hands of the trespasser, personal property for which the land owner could maintain replevin.³

§ 382. **Chattels severed from realty.** No matter how heavy or large the articles may be, they may be replevied if they have been severed from the real estate of which they once formed a part.⁴ On the other hand, personal property may become attached to the real estate in such a manner as to become a part thereof, as boards may be built into a house. In such case replevin will not lie, but plaintiff must

¹ *Hoover v. Hays*, 10 B. Mon. (Ky.), 72. As to house erected under some circumstances, see *Huebschmann v. McHenry*, 29 Wis. 659.

² *Page v. Fowler*, 39 Cal. 415; *Id.* 28 Cal. 608. See *Adams on Eject*, 141-186; *Harrison v. Hoff*, 102 N. C. 126 (8 S. E. 887).

³ *Huebschmann v. McHenry*, 29 Wis. 655.

⁴ *Foy v. Reddick*, 31 Ind. 414; *Reese v. Jared*, 15 Ind. 142; *Huebschmann v. McHenry*, 29 Wis. 659; *Pennybecker v. McDougal*, 48 Cal. 162; *Mills v. Redick*, 1 Neb. 437; *Dubois v. Kelly*, 10 Barb. 496; *Ombony v. Jones*, 21 Barb. 520; *Gear v. Bullendick*, 34 Ill. 74; *Gullett v. Lamberton*, 1 Eng. (Ark.) 118.

resort to some other form of action.¹ But the severance of chattels alone does not change the title. If trees be cut by a tenant without authority, the wood or logs belong to the owner of the land, and he may replevy it.²

§ 383. **The same—In case of a trespasser.** When a trespasser entered on land and sowed grain, and the land was afterward sold by the sheriff upon execution against the owner, *held*, that the purchaser at such sale was entitled to the grain.³ In California this doctrine has been carried so far as to hold that the owner of land cannot sustain replevin for crops raised on the land by one who holds possession with adverse claim of right, even though without color of title.⁴ Where crops of wheat or corn are wrongfully severed by a trespasser, the owner is not divested of his property, but may maintain replevin.⁵ Replevin may be maintained by the owner of the land for wheat which has been threshed and stored on another's premises without his consent.⁶ One who purchases logs of the owner of the land may maintain replevin against the vendee of the one who wrongfully cut them.⁷ The owner of land may maintain replevin for wood cut thereon wrongfully, so long as the wood can be identified.⁸ There is an exception to this rule. Where the person ent-

¹ *Fryatt v. The Sullivan Co.*, 5 Hill (N. Y.), 117; *Ricketts v. Dorrell*, 55 Ind. 470.

² *Halleck v. Mixer*, 16 Cal. 578; *Nichols v. Dewey*, 4 Allen (Mass.), 386; *Schulenberg v. Harriman*, 21 Wall. 44; *Snyder v. Vaux*, 2 Rawle (Pa.), 427; *Gillerson v. Mansur*, 45 Me. 26; *Bower v. Higbee*, 9 Mo. 260.

³ *Hillings v. Wright*, 14 Pa. St. 375.

⁴ *Pennybecker v. McDougal*, 46 Cal. 662.

⁵ *Bull v. Griswold*, 19 Ill. 632; *Anderson v. Hapler*, 34 Ill. 439; *Sands v. Pfeiffer*, 10 Cal. 258; *Langdon v. Paul*, 22 Vt. 205; *Congregational Soc. v. Flemming*, 11 Iowa, 533.

⁶ *Smith v. Hague*, 25 Kan. 246.

⁷ *Brewster v. Carmichael*, 39 Wis. 456.

⁸ *Merrill v. Dixon*, 15 Nev. 401; *Harlan v. Harlan*, 15 Pa. St. 513; *Wincher v. Shrewsbury*, 2 Scam. 284; *Kimball v. Lohman*, 31 Cal. 158; *Street v. Nelson*, 80 Ala. 230; *Snyder v. Vaux*, 2 Rawle (Pa.), 423; *Richardson v. York*, 14 Me. 216; *Davis v. Easley*, 13 Ill. 192.

ting the timber is in adverse possession of the land, title cannot be tried in this way.¹ Nor can damages for conversion be recovered.²

§ 384. **Owner may replevy property illegally severed by a tenant.** Where a tenant illegally severs property from the freehold, the owner may at once bring replevin therefor, notwithstanding the tenant's lease of the freehold has not yet expired.³

§ 385. **Actual severance not necessary.** Thus where, upon a sale of land, the deed reserved the crops and plants growing thereon, it was held that they thereby became personal property and the subject of replevin.⁴ Thus a simple consent or agreement of the owner of the real estate has usually been held sufficient to change the nature of the property and this consent may be inferred from acts, as where an engine and boiler were sold without reference to the land and possession given and acquiesced in, it was *held* to amount to a severance.⁵

§ 386. **Chattels severed by mistake.** Where in case of timber lands a party made a mistake as to the boundary line, and cut trees on the land of another, it was held that replevin would lie by the true owner, and that the occupancy of the land from which they were cut by the defendant could not be urged by him as a defense to the replevin suit. Nothing but an adverse claim of title will defeat the true owner or prevent him from asserting his right to his own property in this manner.⁶

§ 387. **Rights of the holder of a colorable title merely.** The holder of a colorable title merely, without other right

¹ *Street v. Nelson*, 80 Ala. 230; *Beatty v. Brown*, 76 Ala. 267. But see *Kimball v. Lohmas*, 31 Cal. 154.

² *Seymour v. Van Curen*, 17 How. Pr. (N. Y.) 94.

³ *Leonard v. Stickney*, 131 Mass. 541; *Clark v. Holden*, 7 Gray, 8; *Phillips v. Allen*, 7 Allen, 115.

⁴ *Ring v. Billings*, 51 Ill. 475; *Gibbons v. Dillingham*, 5 Eng. (Ark.) 9.

⁵ *Hensley v. Brodie*, 16 Ark. 511; *Waters v. Reuber*, 16 Neb. 106 (19 N. W. 687); *Rush Co. v. Stubbs*, 25 Kan. 322.

⁶ *Young v. Herdic*, 55 Pa. St. 172.

than possession, cannot recover against the real owner by a resort to replevin any more than he could in any other form of action.¹ Where plaintiff cleared and prepared land and put it in wheat, and was in possession when defendant entered and cut it, the defendant on trial offered to prove the land was his, and the plaintiff was a trespasser in sowing the crop, and the court admitted the evidence and its ruling was sustained.²

§ 388. **Instances.** Replevin lies by the owner of swamp land incapable of occupancy, for trees cut thereon.³ But a person claiming land who has not taken the legal steps to perfect his claim cannot maintain replevin for timber cut thereon.⁴ And where lumber is drifted down stream and lodges upon adjacent land, if the owner of the land disclaims damages, the owner of the lumber is not bound to tender damages in order to maintain replevin for the lumber.⁵ Fence rails and stakes, though unlawfully taken by a wrongdoer, when used by him in the construction of a fence upon his real estate, thereby become a part of such realty, and cannot be replevied by the owner as personal property.⁶ It will not lie where defendant is the owner and in possession of real estate on which plaintiff has personal property which defendant does not claim, but offers to allow plaintiff to remove, but refuses to allow plaintiff possession of the real estate where the property is. There must be an actual unlawful detaining.⁷

¹ *Hungerford v. Redford*, 29 Wis. 347; *Hart v. Vinsant*, 6 Heisk. (Tenn.) 616; *Harlan v. Harlan*, 15 Pa. St. 513.

² *Elliott v. Powell*, 10 Watts (Pa.), 454.

³ *Phillips v. Gastrell*, 61 Miss. 413; *Wright v. Guier*, 9 Watts, 172.

⁴ *Bower v. Higbee*, 9 Mo. 259.

⁵ *Flanders v. Locke*, 53 Cal. 20.

⁶ *Ricketts v. Dorrel*, 55 Ind. 470.

⁷ *Bent v. Bent*, 44 Vt. 633.

CHAPTER XVII.

WHERE THE GOODS HAVE BEEN CHANGED IN FORM OR
ENHANCED IN VALUE.

(See also Chapter on Damages.)

	Section.		Section.
Change in form generally —		his property as soon as he	
Rule under the civil law	389	knows of its loss	395
Rule now where property is		Where an innocent purchaser	
changed in form	390	for value changes the form	
Rule—Description should be as		and adds to the value, re-	
it is in its new form	391	plevin will not lie	396
Right to replevin unaffected		The natural increase of live	
by change in form	392	animals may be replevied by	
Application of rule—Illustra-		the owner of the animals . .	397
tions	393	Animals—Increase of may be	
Right of plaintiff not affected		replevied by the owner of	
by change made by agree-		the dam. Exception:	
ment	394	Where dam is hired for a	
Owner should move to reclaim		term, increase belongs to	
		the usufructuary	398

§ 389. **Change in form generally.** The rule under the civil law was that where one wrongfully took the property of another and by his labor enhanced its value by changing its form, the owner of the property so wrongfully taken could claim the property in its changed form with the enhanced value; that is, the wrongdoer received nothing for his labor.¹ While this was a salutary rule in many cases, in many cases it would work a hardship upon the defendant wholly disproportionate to the wrong done to plaintiff by him, as where trees were wrongfully cut and manufactured into furniture at great cost and expense. The tendency of the later decisions, as we shall presently see, has been to com-

¹ Justinian Inst.; Dig. Liber. 10 Tit. 4 Leg. 12; Puffendorf's Law of Nature, Leber. 4, Ch. 7, § 10; Snyder v. Vaux, 2 Rawle, 427.

pensate the original owner fully for all loss, and to stop at that.

§ 390. **Rule where property is changed in form.** The owner of timber taken and converted by a willful trespasser into cross-ties may recover the ties or their value in an action of replevin, from the trespasser or his vendee, with or without notice.¹ The doctrine of these cases is that where the first taking is wrongful, without any shadow of right or title, the enhanced value passes to the rightful owner.² But where the first taking was *bona fide* under a claim of right or title, the original owner should have his property or its value as taken, and the defendant the value of his labor in enhancing the value,³ and this rule violates the rights of the respective parties as little as any general rule could. "Whatever alterations of form any property has undergone, the owner may seize it in its new shape if he can prove the identity of the original materials, as if leather be made into shoes, or cloth into a coat, or a tree be squared into timber."⁴ A party may replevy boards made from trees wrongfully cut on his land. The owner of property wrongfully taken may pursue it so long as it can be identified, whatever alterations in form it may assume.⁵

§ 391. **Rule as to description.** The plaintiff in such cases should describe the property as in the form in which it exists when the action is commenced, and the declaration will be supported by proof of the ownership of the original material and proof tracing it into its changed form.⁶

¹ McKinnis v. L. R. M. R. & T. R. R., 44 Ark. 210; Woodenware Co. v. U. S., 106 U. S. 432; Bly v. U. S., 4 Dill. 464; Wetherby v. Green, 22 Mich. 311; Nesbitt v. St. Paul L. Co., 21 Minn. 491; Heard v. James, 49 Miss. 236; Potter v. Mardre, 74 N. C. 36; 1 Suth. on Dam. 164.

² Silsbury v. McCoon, 3 Comst. (N. Y.) 380.

³ Herdic v. Young, 55 Pa. St. 178; Young v. Herdic, Id. 172; Bull v. Griswold, 19 Ill. 631; Heard v. James, 49 Miss. 236; Snyder v. Vaux, 2 Rawle, 427.

⁴ Street v. Nelson, 80 Ala. 230; Cooper v. Watson, 73 Ala. 252; Wright v. Guier, 9 Watts, 172; Riley v. Boston Power Co., 11 Cush. 11.

⁵ Snyder v. Vaux, 2 Rawle (Pa.), 423.

⁶ Wingate v. Smith, 20 Me. 287.

§ 392. **Right to replevy not affected by change in form.** Plaintiff's right to pursue and replevy is unaffected by any change made in the shape or form. The rule is the same as in trespass or trover.¹

§ 393. **Application of rule—Illustrations.** Property which has undergone a change of form in the hands of the defendant may be recovered by the true owner only so long as it remains substantially the same, and the court is able to say that the one article is composed of the materials of the other; but replevin is never maintainable where there has been a complete change of articles, as the exchange of one horse for another, so that there no longer remains any identity. In such cases the party aggrieved must resort to some other remedy.² But where the contract of sale allows the vendee to exchange the property for other with the assent of the vendor, and this is done, the vendor may maintain detinue for the substituted property whenever he could for the other under the contract.³ Replevin will not lie for a canoe by the owner of the trees from which it was made. If a person bestows his labor upon the property of another, thereby changing it into another species of article, the property is changed, and the owner of the original material can not recover the article in its altered condition, but is only entitled to its value in the shape in which it was taken from him.⁴ It is not essential that it remain in its original form so long as it can be identified.⁵ But if the change has been wrought in good faith by an innocent party, and it has been materially increased in value or has become incorporated with another thing, which is the principal and it is only a part, replevin would not be allowed.⁶ In Pennsylvania the courts hold re-

¹ *Heard v. James*, 49 Miss. 236; *Harris v. Newman*, 5 How. 658; *Brown v. Sax*, 7 Cow. 95; *Wingate v. Smith*, 26 Me. 287; *Davis v. Easley*, 13 Ill. 198; *Silsbury v. McCoon*, 3 Comst. 380.

² *Power v. Telford*, 60 Miss. 195; *Silsbury v. McCoon*, 3 N. Y. 379.

³ *McGinnis v. Savage*, 29 W. Va. 362 (1 S. E. 746).

⁴ *Potter v. Mardre*, 74 N. C. 36.

⁵ *Wingate v. Smith*, 20 Me. 287.

⁶ *Gray v. Parker*, 38 Mo. 165; *Ricketts v. Dorrel*, 55 Ind. 470.

plevin will not lie if the property has undergone an essential change so that its identity cannot be traced, but will lie where there is only a change of form.¹ A plaintiff in replevin, entitled to the possession of certain pictures, left with an artificer to be framed, cannot also take the frames, upon which the artificer claims a lien; nor is the latter bound to remove the frames from the pictures. The plaintiff must act at his peril in the matter.² Where timber is cut upon the public lands willfully, fraudulently, or negligently, and without authority, and made into saw logs, the government may replevy such logs even when they have reached the boom, without deducting for their enhanced value after severance from the freehold, arising from the labor of the wrongdoer.³ But where the timber has been converted into boards and they into a house, the house cannot be replevied; the change is too great.⁴ Where trees growing on plaintiff's unenclosed land were cut by an unknown party, and by defendant hauled to a saw mill and converted into boards which defendant took to his house, the owner of the land was allowed to replevy the boards, on the ground that no alteration in form should prevent the owner from reclaiming his property by replevin so long as he could identify it.⁵ In a similar case in New York the court say that in case of wrongful taking the defendant cannot, by any act of his, change the title to the property.⁶ But the leading case is *Silisbury vs.*

¹ *Snyder v. Vaux*, 2 Rawle (Pa.), 427; *Curtis v. Groat*, 6 Johns. 168; *Babcock v. Gill*, 10 John. 287; *Brown v. Sax*, 7 Cow. 95.

² *Faulkner v. Harding*, 9 Mo. App. 12.

³ *Bly v. United States*, 4 Dill. (8 Circ. Minn.) 464; *Johnson v. McIntosh*, 8 Wheat. 574; *United States v. Cook*, 19 Wall. 593; *Nesbit v. St. Paul Lum. Co.*, 21 Minn. 491.

⁴ *Snyder v. Vaux*, 2 Rawle, 423; *Ricketts v. Dorrel*, 55 Ind. 470; *Betts v. Lee*, 5 Johns. 348; *Brown v. Sax*, 7 Cow. 95; 2 Bla. Com. 404.

⁵ *Davis v. Easley*, 13 Ill. 198.

⁶ *Brown v. Sax*, 7 Cow. 95. See *Ricketts v. Dorrel*, 55 Ind. 470; *Babcock v. Gill*, 10 John. 287; *Curtis v. Groat*, 6 John. 168; *Wild v. Holt*, 9 Mees. & W. 672; *Hyde v. Cookson*, 21 Barb. 92; *Martin v. Porter*, 5 Mees. & W. 352; *Betts v. Lee*, 5 Johns. 348; *Rightmyer v. Raymond*, 12 Wend. 51.

McCoon, 3 Comst. 380, where defendant took corn by a willful trespass and converted it into whisky after two decisions to the contrary,¹ the court finally held that the whisky belonged to the owner of the corn. The case will be more fully considered under the title "Damages," which see.

§ 394. **Rights of plaintiff not affected by change made by agreement with defendant.** Where a levy had been made on gold coin, and by agreement it was converted into paper money for convenience, and the paper money was then replevied by a stranger to the process under which the coin was taken, *held*, that the substitution of the bills by agreement would not defeat the action.²

§ 395. **Owner should move to reclaim his property as soon as he knows of its loss in such cases.** The tendency of the courts in applying the rule last laid down has been to require of plaintiff in such cases a reasonable diligence in asserting his rights, and where the defendant is not a willful wrongdoer, without the shadow of legal excuse, this should always be required of plaintiff.³ Where timber worth twenty-five dollars had been made into hoops worth twenty-eight times as much, by a party acting in good faith, upon a supposed legal right, the Michigan court refused to allow the defendant's labor to be appropriated by the plaintiff, the owner of the timber, and denied his right to replevy the hoops.⁴ So in Pennsylvania, where plaintiff, the owner of the ground, brought trover for coal taken out of his mine by mistake, the court restricted his recovery to the value of the coal before it was mined.⁵ But in Illinois a contrary doctrine has been held.⁶

¹ 4 Denio, 332; 6 Hill, 326. See *Gray v. Parker*, 38 Mo. 160.

² St. L., A. & C. R. R. v. *Castello*, 28 Mo. 380.

³ *Weymouth v. C. & N. W. R. R.*, 17 Wis. 550; *Hungerford v. Redford*, 29 Wis. 345; *Single v. Schneider*, 30 Wis. 572. See *Austin v. Craven*, 4 Taunt. 644.

⁴ *Wetherbee v. Green*, 22 Mich. 311.

⁵ *Forsyth v. Wells*, 41 Pa. St. 291.

⁶ *Robertson v. Jones*, 71 Ill. 405.

§ 396. **Where an innocent purchaser for value changes the form and adds to the value,** it has usually been held replevin would not lie. In a case of this kind, where the change is not an intentional wrong to the original owner, it stands on the same footing as if the original article had been destroyed, and the true owner is not allowed to trace its identity into a manufactured article, for the purpose of appropriating the skill and labor thus added to the original material innocently, but he is put to his action for damages as in conversion, and he may recover its value as it was when it left his possession. And this rule is eminently just, and will work a hardship in very few cases.¹

§ 397. **The natural increase of live animals may be replevied by the owner of the animal.** In an action to recover a band of ewe sheep, or their value, *held*, that their increase and the wool subsequently shorn from the band are proper subjects of litigation in the same action. As to the lambs, the rights of the parties are precisely the same as to the original flock, and as to the wool, the remedy is judgment for the value of their use, and the court should allow supplemental pleadings to be filed raising these claims.² Replevin brought for a female slave entitles the plaintiff to her child, born after the commencement of the action.³ The issue follows the mother.⁴

§ 398. **Animals, increase of may be replevied by owner**

¹ *Wetherbee v. Green*, 22 Mich. 311; *Betts v. Lee*, 5 Johns. 348; *Heard v. James*, 49 Miss. 237; *Martin v. Porter*, 5 Mees. & W. 352; *Ryder v. Hathaway*, 21 Pick. 305; *Riddle v. Driver*, 12 Ala. 590; *Snyder v. Vaux*, 2 Rawle, 427; *Baker v. Wheeler*, 8 Wend. 508; *Hyde v. Cookson*, 21 Barb. 92; *Chandler v. Edson*, 9 Johns. 362; *Curtis v. Groat*, 6 Johns. 168; *Rightmeyer v. Raymond*, 12 Wend. 51; *Baker v. Wheeler*, 8 Wend. 505; *Wild v. Holt*, 9 Mees. & W. 672; *Harris v. Newman*, 5 How. (Miss.) 658; *Putnam v. Cushing*, 10 Gray (Mass.), 334; *Mallory v. Willis*, 4 Comst. 76; *Hiscock v. Greenwood*, 4 Esp. 174; *Linch v. Welsh*, 3 Pa. St. 294.

² *Buckley v. Buckley*, 12 Nev. 423.

³ *Jordan v. Thomas*, 31 Miss. 558; *Scay v. Bacon*, 4 Sneed, 103.

⁴ *Newman v. Jackson*, 12 Wheat. 570.

of the dam—Exceptions. The law is well settled that the increase of the female of live stock belongs to the owner of the dam at the time.¹ The only exception to this rule is where the dam may be hired temporarily for a term. The increase during the term belongs to the usufructuary.² The brood of an animal belongs to the owner of the dam, and replevin may be maintained for them with their dam.³ But when the dam of an unborn foal is sold, reserving the foal, such reserve is valid, and replevin may be brought for the foal after its birth, against the purchaser of the dam, or against one purchasing her from him, although he purchased without notice of the reservation.⁴

¹ *White v. Storms*, 21 Mo. App. 288; *Stewart v. Ball's Admrs.*, 33 Mo. 156.

² *Kent. Com.* 360-1.

³ *Phipps v. Martin*, 33 Ark. 207.

⁴ *Andrews v. Cox*, 42 Ark. 473.

CHAPTER XVIII.

CONFUSION OF GOODS OF DIFFERENT OWNERS.

	Section.		Section.
'Generally	399	Where the confusion is occasioned by the willful act of one party, he must bear the loss	405
'Of articles separable into aliquot parts, as pounds, bushels, etc.—Where the confusion is without malice, each owner takes his just proportion	400	Articles that can be identified can be replevied—As to them, it is not a confusion .	406
Replevin can be maintained for part of mass if it can be identified	401	One who willfully mixes property can only replevy that he can identify	407
The same—When for a part of cotton in mass	402	Where the confusion is by agreement—Rule	408
Loss, if any, must fall on the one causing the mixture .	403	Commingling of property—Right of partowner against a stranger	409
States or United States may replevy their property from mass	404		

§ 399. **General rule.** Where goods of different owners become confused or mixed, the general rule is, that if they can be separated without injury or loss to either party, the separation may be made by either party bringing a replevin suit for his share. But if the property cannot be so divided, or if loss is to occur, the solution is not quite so simple. If the goods were willfully mixed by one party, he must bear all the loss, and the other can bring replevin for his property, or for the whole, if necessary. If the confusion occurred by the neglect of one party, but not willfully, then the other party may take his share by replevin, but not the whole property.

§ 400. **Of articles separable into aliquot parts as pounds, etc., and where the confusion is without malice.** When a mixture of cereal grains occurs by consent of the

owners, or under circumstances in which the mixture would be reasonably expected by the parties, and the property mixed is of the same nature and value, although not capable of an actual separation by identifying each particle, yet if a division can be made of equal value, as in the case of corn, oats, and wheat, the law will give to each owner his just proportion, and such owner may recover his share by replevin.¹ When articles like wheat and the flour manufactured therefrom, wine, oil, fruits, etc., which are sold not by a description which refers to and distinguishes the particular thing, but in quantities which are ascertained by weight, measure, or count, and which are undistinguishable from each other by any physical difference in size, shape, texture, or quality, and there are different owners of the common mass, each having a separate property in his share, and each entitled to sever it from the share or shares of the others, each may bring replevin for his share of the same, subject to deductions for any loss or waste properly falling to his share, while the property remains in mass.² Replevin may be maintained for grain in bin with other grain where plaintiff is entitled to a certain quantity, as a number of bushels.³ Where the property is severable by the pound or bushel, etc., one party may maintain replevin for his part without regard to the others.⁴ It is undoubtedly true that in an action in the nature of replevin, for the recovery of specific chattels,

¹ *Piajzek v. White*, 23 Kan. 621.

² *Young v. Miles*, 20 Wis. 646; *Kimberly v. Patchin*, 19 N. Y. 330; *Kaufmann v. Schilling*, 58 Mo. 218; *Wilson v. Nason Bosw.* (N. Y.) 155; *Ryder v. Hathaway*, 21 Pick. 298; *Story on Bailments*, same title; *Morgan v. Gregg*, 46 Barb. 183; *Bristol v. Burt*, 7 John. 254; *Inglebright v. Hammond*, 19 Ohio, 337; *Moore v. Erie R. R. Co.*, 7 Lans. (N. Y.) 39.

³ *Groff v. Belche*, 62 Mo. 400; *Kaufman v. Schilling*, 58 Mo. 218; *Henderson v. Lauck*, 21 Pa. St. 359; *Inglebright v. Hammond*, 19 Ohio, 337; *Ryder v. Hathaway*, 21 Pick. 305.

⁴ *Forbes v. Shattuck*, 22 Barb. 568; *Tripp v. Riley*, 15 Barb. 334; *Morgan v. Gregg*, 46 Barb. 184; *Ames v. Mississippi Boom Company*, 8 Minn. 473.

their identity must be shown before they are liable to seizure.¹ But where the goods are mixed, and are of the same nature and value, although not capable of an actual separation by identifying each particle, yet if a division can be made of equal value, as in the case of oats, corn, or wheat, each party may claim his aliquot part.²

§ 401. **Replevin can be maintained for part of mass if it can be identified.** Property part of a mass can be replevied if it can be identified, even though it has not yet been received and weighed, nor an ascertained quantity agreed upon.³ Replevin lies only for specific property distinguishable from other property of the same kind.⁴ It is not a bar to an action of replevin that the plaintiff's goods have been commingled with like goods of the defendant's by the wrongful act of a third party. It *seems*, however, that if the character of the goods is so essentially changed by the mixture that one aliquot part would not be the equivalent of another, the case would present a different question.⁵

§ 402. **The same—When for a part of cotton in mass.** Replevin cannot be maintained for cotton mixed in the same bale with the defendant's.⁶ Where plaintiff bought 900 pounds

¹ Gray v. Parker, 38 Mo. 160.

² Kaufmann v. Schilling, 58 Mo. 218; Inglebright v. Hammond, 19 Ohio, 337; Ryder v. Hathaway, 21 Pick. 305; Henderson v. Lauck, 21 Pa. St. 359; Story on Bailm., § 40; Eldred v. The Oconto Co., 33 Wis. 141.

³ Landler v. Bresnaham, 53 Mich. 567 (19 N. W. 188). This was for a car-load of iron, but partly loaded when bought.

⁴ Mead v. Johnson, 54 Conn. 317 (7 A. 718). This was replevin for twenty-eight gallons of proof brandy, when defendant had no proof brandy, but more than twenty-eight gallons of brandy above proof.

⁵ Wilkinson v. Stewart, 85 Pa. 255. This was oil which had been drawn off by agreement to return a like amount, but benzine and oil of an inferior quality had been returned in part. An owner of oil in tank or pipe line may take out his aliquot part. Hutchison v. The Commonwealth, 1 Norris, 472. May replevin whether he ever had possession or not. Harlan v. Harlan, 3 Harris, 507. See also Wood v. Fales, 12 Harris, 246; Tripp v. Riley, 15 Barb. 333; Forbes v. Shattuck, 22 Id. 568; Kimberly v. Patchin, 19 N. Y. 330.

⁶ McKennon v. May, 39 Ark. 442.

of cotton to be delivered at a certain gin, and 1,100 pounds were delivered at the gin and put in a separate place, the extra 200 pounds being sold to the ginner by the one who delivered the cotton, *held*, that this was a sufficient identification and delivery of the cotton, and replevin would lie.¹ Replevin cannot be maintained for a mass of cotton in which the plaintiff's has been *innocently* mixed by the defendant, nor for an undivided share of the mass. It must be first separated and capable of identification.²

§ 403. **Loss, if any, must fall on the one causing the mixture.** Where defendant has mixed other grain of his own with that claimed by plaintiff, he cannot thus by his own act defeat the action, but must bear the loss resulting therefrom.³ Where plaintiff's logs had been mixed with those of defendant, and there was no evidence that the former differed in description, quality, or value from the latter, and plaintiff was unable to identify his own, he was allowed to recover a quantity of logs out of the common mass, equal to the quantity owned by him.⁴ But this principle should not be carried further than is absolutely necessary to protect an innocent party from injury. The loss upon the other party should be made as light as possible, and should not be carried to the extent of revenge or punishment unless the confusion was willful or with malice.⁵ If the property claimed be so mixed with other property that a delivery of the specific article cannot be made, and the plaintiff fails to ask

¹ *Graves v. Cowan*, 43 Ark. 134.

² *Hart v. Morton*, 44 Ark. 447; *Person v. Wright*, 35 Ark. 169; *Washington v. Love*, 34 Ark. 93; *Ward v. Worthington*, 33 Ark. 830; *Ryder v. Hathaway*, 21 Pick. 306; *The "Idaho"* 93 U. S. 575; 2 *Schouler's Pers. Prop.* § 49; *Story on Bailment*, § 40.

³ *Samson v. Rose*, 65 N. Y. 411.

⁴ *Eldred v. The Oconto Co.*, 33 Wis. 133; *Newton v. Howe*, 29 Wis. 531; *Stearns v. Raymond*, 26 Wis. 74; *Schulenberg v. Harriman*, 21 Wall. 44.

⁵ *Halbrook v. Hyde*, 1 Vt. 286; *Simmons v. Jenkins*, 76 Ill. 483. See *Rose v. Gallup*, 33 Conn. 338, a trespass case where tools of A and B were mixed, and A sold his to C without separating those sold, and C took part of B, and B brought trespass and was defeated.

judgment for its value in case it cannot be delivered, the action of claim and delivery can not be maintained.¹

§ 404. **State or United States may replevy.** Where logs cut from the lands of the state without license have been intermingled with logs cut from other lands, so as not to be distinguishable, the state is entitled to replevy an equal amount from the whole mass.² The United States may maintain replevin for logs or lumber, the product of trees wrongfully cut on its public lands.³

§ 405. **Where the confusion is occasioned by the willful act of one party,** he loses all right to the common mass as against the innocent party; thus, where defendant changed the mark on plaintiff's logs and put a mark on them like his own, and mixed them with his own, plaintiff was allowed to replevy the entire lot.⁴ As where a mortgagor carelessly or purposely mingles the mortgaged property with like property not mortgaged, and sells both, the mortgagee may replevy the whole, and the purchaser in such a case must point out the goods and furnish the proper proof to distinguish the part claimed by him as not mortgaged, or on his failure to do so lose all, so far as the replevin suit is concerned.⁵ Or where an officer mixes goods attached by him with similar goods attached by another officer, he loses his special property as against the other officer.⁶ "If one willfully intermixes his "money, corn, or hay with that of another, without his appro-

¹ *Hull v. Hull*, 1 Idaho, 361.

² *Schulenberg v. Harriman*, 21 Wallace (U. S. S. Ct.), 44. Id. 2 Dill. 398.

³ *Bly v. U. S.*, 4 Dill. (8th C. Minn.) 464; *Johnson v. McIntosh*, 8 Wheat. 574; *U. S. v. Cook*, 19 Wall. 593.

⁴ *Wingate v. Smith*, 20 Me. 287; *Jenkins v. Steanka*, 19 Wis. 127; *Willard v. Rice*, 11 Met. 493; *Ryder v. Hathaway*, 21 Pick. 299; *Seavy v. Dearborn*, 19 N. H. 351; *Stephenson v. Little*, 10 Mich. 433; *Gilman v. Hill*, 36 N. H. 311; *Thorne v. Colton*, 27 Iowa, 427; *Weil v. Silverstone*, 6 Bush. (Ky.) 698; *Beach v. Schmultz*, 20 Ill. 185.

⁵ *Adams v. Wildes*, 107 Mass. 124; *Johnson v. Neale*, 6 Allen, 227; *Ropes v. Lane*, 9 Allen, 502; *Hyde v. Cookson*, 21 Barb. 92; *Barron v. Cobleigh*, 11 N. H. 557; *Seibert v. McHenry*, 6 Watts (Pa.), 301; *Rockwell v. Saunders*, 19 Barb. 473.

⁶ *Gordon v. Jenny*, 16 Mass. 469.

"bation or knowledge, or casts his gold in a like manner into another's melting-pot, our law, to guard against fraud, allows no remedy in such case, but gives the entire property, without account, to him whose original dominion is invaded, and endeavored to be rendered uncertain, without his consent. But if the mixture be by consent, then both have a common interest in proportion to their respective shares."¹ Or where a person bought a stock of mortgaged drugs and mixed them with his own, and the mortgagee, in attempting to take the mortgaged property, took some not mortgaged, he would not be chargeable in trespass.²

§ 406. **Articles that can be identified can be replevied; as to them, it is not a confusion.** But of course a party would be allowed to take such specific articles in such case as he could identify. As to such goods, no mixture or confusion has occurred, and the party has lost none of his rights as to those articles.

§ 407. **One who willfully mixes property can only replevy that he can identify.** Where one person adds mill logs of his own to a pile of logs belonging to another person, and marks them in the same manner as others are already marked, he cannot afterward maintain replevin against such other person for his portion of the logs, but only for such logs as he can identify as his own.³ Where a man fraudulently took logs, made them into boards, and mixed them with his own boards with a fraudulent intent to thereby deprive the owner of his property, the owner of the logs thus taken was allowed to maintain replevin for the whole pile of boards, and in the writ the property was described as boards, and not as logs.⁴

¹ 2 Black. Com. 405; *Sims v. Glazner*, 14 Ala. 699; *McDowell v. Bissell*, 37 Pa. St. 164; *Low v. Martin*, 18 Ill. 286; *Dodge v. Brown*, 22 Mich. 451; *Root v. Bonnama*, 22 Wis. 539; *Ward v. Æyre*, 2 Bulst. 323; *Lupton v. White*, 15 Ves. 432; *Hart v. Ten Eyck*, 2 John. Ch. 62.

² *Fuller v. Paige*, 26 Ill. 359; *Dillingham v. Smith*, 30 Me. 372; *Collins v. Reeve*, 2 Campb. 575; *Smith v. Morrill*, 56 Me. 566.

³ *Dillingham v. Smith*, 30 Me. 370.

⁴ *Wingate v. Smith*, 20 Me. 287.

§ 408. **Where the confusion is by agreement,** it is usually looked upon as creating a tenancy in common, and each party may replevin his aliquot part of the whole, loss if any, to fall upon them in the proportion their several parts are to the whole.¹ Where wheat was stored in a warehouse, and, by consent of the owner, it was mixed with that of the warehouseman, after shipment from the bulk, until an amount not more than that stored by the plaintiff remained, he was held the absolute owner; and a sale by the warehouseman of such remainder was a wrongful conversion, and the owner would have a right to follow it as long as he could identify it.²

§ 409. **Commingling of property right of part owner against a stranger.** In the absence of a proper objection by answer or demurrer, an owner of personal property in common with others may, without joining his co-owner, maintain an action of claim and delivery to recover possession of the common property from a stranger having no right to the possession of the same or any part thereof.³

¹ Nowlen v. Colt, 6 Hill, 461; Low v. Martin, 18 Ill. 286; Warner v. Cushman, 31 Ill. 283; Parker v. Garrison, 61 Ill. 252; Stevenson v. Little, 10 Mich. 433; Buckley v. Buckley, 9 Nev. 379; Lupton v. White, 15 Ves. 432; Forbes v. Shattuck, 22 Barb. 568; Tripp v. Riley, 15 Barb. 384.

² Young v. Miles, 20 Wis. 615; Id. 23 Wis. 644.

³ Miller v. Darling, 22 Minn. 303. See also Wright v. Bennett, 3 Barb. 451; Russell v. Allen, 13 N. Y. 173; White v. Brooks, 43 N. H. 402; Shouler on Pers. Prop. 198.

CHAPTER XIX.

GOODS ACQUIRED BY THEFT OR FRAUD.

Section.	Section.
Owner may replevy stolen goods wherever found . . . 410	When property traded for stolen property may be replevied 417
Against a thief, an innocent purchaser may elect to affirm the sale or exchange and keep the property . . . 411	Trade or barter of property—Fraud—Rescission of contract 418
Ratification cannot be inferred by lapse of time . . . 412	Replevin will lie where possession is obtained by fraud of defendant 419
Owner may replevy chattels obtained from him by fraud wherever found 413	Markets overt, unknown in this country 420
It lies for goods obtained by the fraudulent use of the process of a court 414	One who has participated in the fraud, or his representatives, cannot regain possession by replevin . . . 421
Replevin will not lie for goods obtained by fraud, in the hands of innocent purchasers 415	A purchaser of stolen property cannot maintain replevin against the owner who has acquired possession . . . 422
Distinction between acquiring goods by theft and by fraudulent purchase 416	

§ 410. **Owner may replevy stolen goods wherever found.** A thief can acquire no title to the goods he has stolen, and can convey none by any sale or delivery he may make, and the owner may replevy them wherever he can find them.¹ Under the common law, before the owner could

¹ 2 Black. Com. 449; *Arrendale v. Morgan*, 5 Sneed (Tenn.), 703; *Johnson v. Peck*, 1 Wood & M. C. C., 334; *Lance v. Cowen*, 1 Dana (Ky.), 195; *White v. Spettigue*, 1 Carr & Ker. 673; *Courtis v. Cane*, 32 Vt. 232; *Florence S. M. Co. v. Warford*, 1 Sweeny (N. Y.), 433; *Hoffman v. Carow*, 20 Wend. 20; *Saltus v. Everett*, 20 Wend. 275; *Beazley v. Mitchell*, 9 Ala. 780; *Parham v. Riley*, 4 Cold. (Tenn.) 9; *Sharp v. Parks*, 48 Ill. 513.

replevy stolen property, he must convict the thief. This was to make it an inducement for him to prosecute the thief, but if the goods were found in the hands of a third party, not the thief, or in collusion with him, the rule did not apply, and replevin might be brought at once. But now the owner has his civil action without regard to the criminal action.¹

§ 411. **Against a thief an innocent purchaser may elect to affirm the sale or exchange and keep the property.** Thus, if one buy or exchange for a stolen horse, the owner can recover the horse, and the purchaser may elect to rescind the contract and recover the consideration (property traded to the thief) or he may affirm the contract and recover the value of the horse from the thief who sold him.²

§ 412. **Ratification cannot be inferred by lapse of time.** In replevin for a mare, alleged to have been stolen and sold by the plaintiff's son, it is error for the court to instruct the jury that they might infer a ratification of the sale by the plaintiff from his delay to sue for more than a reasonable time, to be judged of by them.³

§ 413. **Owner may replevy chattels obtained from him by fraud wherever found.** Defendant by forged letters of recommendation, and other false representations, bought goods and paid in bills which he represented to be accepted by responsible men, but which were in fact accepted by

¹ *Foster v. Tucker*, 3 Gr. (Me.) 458; *Newkirk v. Dalton*, 17 Ill. 415; *Boston, etc., v. Dana*, 1 Gray, 83; *Wells v. Abraham*, L. R., 7 Q. B., 554; *Boody v. Keating*, 4 Gr. (Me.) 164; *Hoffman v. Carow*, 22 Wend. 285; *Gordon v. Hostetter*, 37 N. Y. 99; *Pettingill v. Rideout*, 6 N. H. 454; *Short v. Barker*, 22 Ind. 148; *Crosby v. Leng*, 12 East. 409; *White v. Spettigue*, 13 M. & W. 608. But see, for contrary rule, *Harwood v. Smith*, 2 T. R. 750; *Gimson v. Woodfall*, 2 Carr & P. 41. See Stat. Victoria, 24-25, chap. 96, § 100, and 7 and 8 George IV., chap. 20, § 57.

² *Titcomb v. Wood*, 38 Me. 561; *Lee v. Portwood*, 41 Miss. 111; *Smith v. Graves*, 25 Ark. 458; *Sprights v. Hawley*, 39 N. Y. 441; *Stanley v. Gaylord*, 1 Cush. 536; *Dudley v. Hawley*, 40 Barb. 397. A contrary rule was followed in *Rogers v. Hine*, 2 Cal. 571.

³ *Watkins v. White*, 4 Ill. (3 Scam.) 549.

an accomplice and were worthless. The goods were delivered, and shortly after levied on by the sheriff with an execution. In trover against the sheriff, it was held no property passed, and that the owner could recover.¹ So where the purchaser represents himself to be solvent when he is not, such fraudulent representations avoid the sale, and replevin will lie by the seller.² For a full discussion of this subject, see chapter on "Vendor and Vendee" (XI).

§ 414. **It lies for goods obtained by the fraudulent use of the process of a court.** Thus where a party falsely and maliciously and without probable cause sue out a warrant and cause the arrest of another, and thereby induce him to deliver goods to obtain his release, the party so defrauded may sustain replevin for his goods. The law will not permit the use of its process to aid in the perpetration of a fraud.³

§ 415. **Replevin for goods obtained by fraud, in the hands of an innocent purchaser for value, will not lie.** Thus where a party, by personating another, procured possession of leather, shipped it to Chicago, and sold it in open market, the real owner was allowed to maintain trover against the purchaser for the value, the court holding that the vendor had not parted with his title. Bare possession is not title, and when that possession is obtained by force or fraud, as in this case, it confers no right.⁴ Notwithstanding the above cases, the almost universal rule is that where goods have been procured by fraud, and sold to an innocent third party, replevin will not lie by the owner on the familiar principle that, where one of two innocent parties must suffer, he by whose act such a state of circumstances arose must be

¹ Tomplin v. Addy, in note to Mowry v. Welsh, 8 Cow. 238.

² Ash v. Putnam, 1 Hill (N. Y.), 308; Powell v. Bradlee, 9 Gill & J. (Md.) 220; Bristol v. Wilsmore, 1 Barn. & Cress. 515; Kilby v. Wilson Ry. & M. 178; Atkins v. Barwick, 1 Stra. 165; Johnson v. Peck, 1 Wood & M. 334.

³ Foshay v. Ferguson, 5 Hill, 156; Watkins v. Baird, 6 Mass. 506.

⁴ Fawcett v. Osborn, 32 Ill. 411. See McKnight v. Morgan, 2 Barb. 171; Galvin v. Bacon, 11 Me. 28; Lee v. Portwood, 41 Miss. 109. See chapter on "Vendor and Vendee" (XI).

the one to suffer.¹ Until the seller has made use of his option to rescind the sale, the purchaser, no matter what fraud has been practiced, takes a title which may or may not be ratified by the vendor; and if, while so holding, he sell to a *bona fide* purchaser for value, it will pass title.²

§ 416. **Distinction between acquiring goods by theft and by fraudulent purchase.** Where goods are stolen, the original owner has not parted with his title, and the thief has no title and can convey none; but where they are purchased by fraudulent representations, the purchaser takes a title voidable at the option of the seller, but, until declared void by him, is perfectly valid as to all others, and if the goods are transferred to an innocent third party for value in due course of business, and without notice, he takes a good title, and the seller cannot replevy them from him.³

§ 417. **When property traded for stolen property may be replevied.** A traded his mule to B for one that was stolen. B sold A's mule to C, an innocent purchaser for value. *Held*, that A could not replevy from C.⁴ Where prop-

¹ *Harrison v. McIntosh*, 1 Johns. 384; *Jennings v. Gage*, 13 Ill. 610; *Harris v. Smith*, 3 S. & R. (Pa.) 21; *Ditson v. Randall*, 33 Me. 202; *Bristol v. Wilsmore*, 1 Bar. & C. 515; *Kilby v. Wilson Ry. & M.* (N. P.) 178; *Brundage v. Camp*, 21 Ill. 331; *Caldwell v. Bartlett*, 3 Duer. 341; *Smith v. Lynes*, 1 Seld. 41; *Powell v. Bradlee*, 9 Gill. & J. (Md.) 220; *Butters v. Haughwout*, 42 Ill. 18; *Burton v. Curyea*, 40 Ill. 320; *Kingsford v. Merry*, 34 E. L., & Eq. 607; *Williams v. Given*, 6 Gratt. 268; *Keyser v. Harbeck*, 3 Duer. 373; *Arendale v. Morgan*, 5 Sneed (Tenn.), 704; *Malcom v. Loveridge*, 13 Barb. 373.

² *Chicago Dock Co. v. Foster*, 48 Ill. 507; *State v. Wells & Fargo*, 15 Cal. 340; *Meers v. Waples*, 3 Houst. (Del.) 581; *Hoffman v. Noble*, 6 Met. 75; *Root v. French*, 13 Wend. 570; *Smith v. Lynes*, 1 Seld. (N. Y.) 47.

³ *Saltus v. Everett*, 20 Wend. 267; *Sargent v. Sturm*, 23 Cal. 362; *Covill v. Hill*, 4 Denio, 323; *Deshon v. Bigelow*, 8 Gray, Mass. 159; *Williams v. Merle*, 11 Wend. 80; *Cobb v. Downs*, 10 N. Y. 339; *Farley v. Lincoln*, 51 N. H. 576; *Neal v. Williams*, 18 Me. 391; *Mowrey v. Walsh*, 8 Cow. 238; *Root v. French*, 13 Wend. 570; *Hurst v. Gwennap*, 2 Starkie, 306; *Hyde v. Noble*, 13 N. H. 494; *Nash v. Mosher*, 19 Wend. 433; *Ingersoll v. Emmerson*, 1 Carter (Ind.), 77; *Johnson v. Peck*, 1 Wood & M. C. C. 334.

⁴ *Jackson v. Sparks*, 36 Ga. 445; *Brown v. Campbell*, 6 Har. & J. (Md.)

erty is exchanged for other property, known by the party giving it in exchange to have been stolen, and the stolen property is retaken by the rightful owner, the party injured may maintain replevin for his property so wrongfully obtained from him.¹ Where one purchased goods and paid for them with other goods, which were stolen, he was allowed to maintain replevin for his property, which by the fraud he had been induced to part with, and this is the general rule.² So where goods were purchased and paid for with counterfeit money, replevin will lie.³

§ 418. **Trade or barter of property—Fraud—Rescission of contract.** Where, in a trade or barter of property, the trade is procured by one of the parties by false and fraudulent representations as to the quality of the property disposed of by him, the defrauded party may, upon the discovery of the fraud, rescind the contract and maintain replevin for the property procured by such fraud, and this may be done without returning the property received by the defrauded party when such return is impossible, or where the party guilty of the fraud has by his own act put it out of the power of such defrauded party to make such return, and this fraud may consist in words, acts, or the suppression of material facts with the intent to mislead and deceive.⁴

§ 419. **Replevin will lie where possession is obtained by fraud of defendant.** Where one obtains possession of

491. See *Doe v. Martyr*, 4 Boss. & Pull. 332. This was not a case where the owner of the stolen property brought suit, but the plaintiff was seeking to recover property which he had voluntarily sold and delivered, and which had come into the hands of a *bona fide* purchaser for value.

¹ *McDonald v. Smith*, 21 Ark. 460.

² *Titcomb v. Wood*, 38 Me. 563; *Lee v. Portwood*, 41 Miss. 111; *Manning v. Albee*, 11 Allen, 520.

³ *Green v. Umphrey*, 50 Pa. St. 213. See chapter on "Vendee and Vendor."

⁴ *Faulkner v. Klamp*, 16 Neb. 174 (20 N. W. 220). In this case the defendant traded a diseased mule to plaintiff, representing that he was sound, and moved to another county before plaintiff discovered the deception, and the mule died of the disease while in the plaintiff's possession.

property on the pretext of hiring it, but for the real purpose of taking it to another state for the purpose of having an attachment levied upon it, it is a fraud *ab initio*, and replevin will lie by the true owner.¹ Where the defendant, by his encouragement, procured a messenger to leave a machine with him, knowing that it was intended for another, the taking was regarded as wrongful, and the owner might sustain replevin without demand.² Where a willful trespasser cut logs on another's land and sold them to one who sold them to an innocent purchaser for value, the owner was permitted to recover their value, with interest, from such purchaser, or he might have recovered the logs, had he been able to identify them.³

§ 420. **Markets overt unknown in this country.** The common law forbids the sale of anything above the value of twenty pence, except in market overt. Sales in market overt were very formal affairs—were required to be open after notice, and the sale of an article was preceded by proof of ownership on the part of the vendor. So that there was little danger of stolen goods being offered, or if offered, the true owner was likely to claim them before sale. So that a purchase in market overt conveyed a good title to the purchaser even of stolen goods.⁴ But markets overt are unknown in this country, and consequently the exception founded thereon in the common law is unknown in our law.⁵

§ 421. **One who has participated in the fraud, or his representatives, cannot regain possession by replevin.** A. delivered notes to B. on a trust secret and fraudulent as to A.'s creditors. A. died. His representatives were not allowed

¹ Joplin v. Carrier, 11 S. C. 327.

² Purvis v. Moltz, 5 Robt. (N. Y.) 653.

³ Nesbitt v. St. Paul Lum. Co. 21 Minn. 491. See Gibbs v. Jones, 46 Ill. 320; Riley v. Boston Water Power Co., 11 Cush. 11; Riford v. Montgomery, 7 Vt. 418; Courtis v. Cane, 32 Vt. 232; Schulenberg v. Harri-man, 21 Wall. 44; Williams v. Merle, 11 Wend. 80.

⁴ 2 Black. Com. 449; Hoffman v. Carow, 22 Wend. 285.

⁵ Griffith v. Fowler, 18 Vt. 390; Dame v. Baldwin, 8 Mass. 518; Parham v. Riley, 4 Cold. (Tenn.) 9; Ventres v. Smith, 10 Peters, 161; Newkirk v. Dalton, 17 Ill. 415; Lowry v. Hall, 2 W. & S. (Pa.) 134.

to bring replevin for the notes.¹ When the defendant recommended L. as a man of means, and induced the plaintiff to sell him furniture, L. soon after absconded, after having transferred the furniture and other goods to the defendant. The plaintiff was permitted to prove that the defendant had recommended L. in like manner to others, and that the goods so obtained were transferred to the defendant, as a circumstance to show knowledge on his part, and to recover.² "When an apparent state of ownership of property produced "by consent or collusion is the means of deceiving third "persons, the owner cannot enforce his rights against such "persons in replevin."³ Where a party sought to recover intoxicating liquors from the possession of the sheriff, who had seized them on process of attachment against the purchaser, on the ground that he had made fraudulent representations, which induced plaintiff to sell them, but it appeared that the sale was a device to evade the law, the court refused to allow the plaintiff to recover them.⁴

§ 422. **A purchaser of stolen property cannot maintain replevin against the owner who has acquired possession.** A purchaser of stolen property from a pawnbroker in good faith cannot support replevin for the property against the true owner, or one to whom the property has been delivered for identification by him with the consent of the owner.⁵ Where property has been stolen, the trespasser cannot maintain replevin for the detention of it; nor can his vendee, when it appears that it was thus acquired.⁶

¹ *Gibbins v. Peeler*, 8 Pick. (Mass.) 254.

² *Allison v. Matthieu*, 3 Johns. 235.

³ *Daniels v. Fitch*, 8 Pa. St. 497; *Payne v. Bruton*, 5 Eng. (10 Ark.) 53.

⁴ *Marienthal v. Shafer*, 6 Iowa, 226.

⁵ *Weller v. Ely*, 45 Conn. 547.

⁶ *Parham v. Riley*, 4 Coldw. (Tenn.) 5.

CHAPTER XX.

ON PARTIES—PLAINTIFF AND DEFENDANT—INTERVENTION
AND SUBSTITUTION.

	Section.		Section.
Plaintiffs generally	423	property wrongfully is the	
Trustees—Executors—Admin-		proper defendant, and not	
istrators.	424	the party he represents—	
The action must be brought		Constructive possession. . .	436
in name of real party in in-		The same—Execution—Con-	
terest	425	structive possession . . .	437
Wife may maintain in her		Constructive possession—	
own name	426	Mere paper levy insufficient	438
Non compos mentis. . . .	427	Power and authority of the	
Assignment of the right to		officer as a defendant in	
replevy property—Sale . .	428	such cases	439
Joint owners must join as		Where judgment plaintiff di-	
plaintiffs.	429	rects the officer to levy on	
Where property is owned by		specific property, he is liable	440
two jointly	430	Co-defendants—Who may be	441
Defendants generally	431	One of two wrongdoers may	
Who is the proper defendant.	432	be sole defendant	442
Defendant must have posses-		The one having the actual	
sion at the time the suit		possession the proper de-	
was commenced	433	fendant, though acting for	
But will lie against one hav-		another	443
ing the legal title, though		Intervention—Change and	
the property has not been		substitution of new defend-	
moved by him	434	ants—Lienholders—Costs .	444
But if he wrongfully took it		Trial of the right of property	
and disposed of it to avoid		cannot be turned into re-	
the replevin, he is a proper		plevin—Intervenor . . .	445
defendant	435	Intervention—Substitution .	446
An officer who levies upon			

§ 423. As a general rule, any person in fact or in law may bring replevin when his legal right of possession over personal property has been denied, interfered with, or abridged unlawfully, and the party whose legal rights have

been thus unlawfully invaded, and who has the right to the immediate and exclusive possession, is the proper plaintiff. It has been held that the state was the proper party to bring replevin for logs wrongfully cut from land the title of which was in the state.¹ Where the law makes it the duty of an officer to preserve all books and papers belonging to his office, he may maintain replevin for them against any one who assumes to take them.² A church or other society may maintain the action.³ In Massachusetts, where the parochial system prevails, a parish may maintain the action by its parish name for the recovery of its records.⁴ It will lie by a corporation.⁵ A corporation should sue in its corporate name and capacity.⁶ A father, being the natural guardian of his minor children, may sustain replevin for their property when they have no legal guardian.⁷ Or an infant may sue by a next friend.⁸ A guardian may bring replevin for the property of his ward.⁹ A minor should bring the action by guardian or next friend.¹⁰ An officer may bring replevin for goods he has seized under process if his possession be interfered with.¹¹ Whether or not a receiptor to the officer for property thus taken by him has such a right as will support replevin has been decided both ways, but the better rule is that laid down in *Miller vs. Adsit*, that where the receiptor is accountable to the officer

¹ *Hall v. White*, 106 Mass. 599; *Richardson v. Reed*, 4 Gray, 441; *Schulenberg v. Harriman*, 21 Wallace, 44.

² *Phenix v. Clark*, 2 Gibbs (Mich.), 327.

³ *Holliday v. Camsell*, 1 Durnf. & E. 658; *Newton v. Gardner*, 24 Wis. 232; *Corbett v. Lewis*, 53 Pa. St. 322.

⁴ *Sudbury v. Stearns*, 21 Pick. 148.

⁵ *Buch v. Fulton Bank*, 7 Cow. (N. Y.) 485; *Maund v. Monmouth*, 1 Carr & Marsh, 606; *Fayette Ins. Co. v. Rogers*, 30 Barb. 491.

⁶ *Bartlett v. Brickett*, 14 Allen, 62.

⁷ *Newman v. Bennett*, 23 Ill. 427; *Smith v. Williamson*, 1 Har. & J. (Md.) 147.

⁸ *Tift v. Tift*, 4 Denio, 175.

⁹ *Deacon v. Powers*, 57 Ind. 489; *Newman v. Bennett*, 23 Ill. 427.

¹⁰ *Keegan v. Cox*, 116 Mass. 290.

¹¹ *Brownell v. Manchester*, 1 Pick. 232.

he can maintain replevin.¹ A mere servant who has possession at the will of the owner has not such a right of possession as will sustain the action.² But if the servant is in fact a bailee, and responsible for the goods as such, he could replevy them from a stranger who interfered with his right.³

§ 424. **Trustees, executors, administrators.** The action may be sustained by trustees when they are entitled to the possession of chattels in that capacity.⁴ One entitled to possession for the use of another may bring replevin.⁵ An executor or administrator, as a representative of the deceased, can maintain the action.⁶ Where the alleged taking was from the deceased in his lifetime, the plaintiff (administrator) must show that the deceased had the right of possession, at his death, and the appointment of plaintiff as administrator or executor.⁷ But an administrator has been allowed to sue in his individual capacity on the ground of his individual liability.⁸ Where plaintiffs brought an action of replevin as *executors* of B, and during the trial were on motion allowed to strike out the word *executors* and substitute the words *heirs at law*, and to add the names of other heirs at law as co-plaintiffs, *held* proper, and to not release the sureties on defendant's property bond for retention of the property.⁹ In the absence of one having a higher right, a surviving part-

¹ *Miller v. Adsit*, 16 Wend. 335; *Ludden v. Leavitt*, 9 Mass. 104; *Warren v. Leland*, 9 Mass. 265; *Commonwealth v. Morse*, 14 Mass. 217; *Dillenback v. Jerome*, 7 Cow. 294; *Norton v. People*, 8 Cow. 137.

² *Ludden v. Leavitt*, 9 Mass. 104; *Brownell v. Manchester*, 1 Pick. 232; *Clark v. Skinner*, 20 Johns. 465.

³ *Harris v. Smith, S. & R. (Pa.)* 23.

⁴ *Baker v. Washington*, 5 Stewart & P. (Ala.) 144.

⁵ *Pearce v. Twitchell*, 41 Miss. 344.

⁶ *Allen v. White, Admr.*, 16 Ala. 181; *Cummings v. Tindall*, 4 Stewart & P. (Ala.) 361; *Hambly v. Trott*, 1 Cowp. 374; *Cravath v. Plympton*, 13 Mass. 454.

⁷ *Halleck v. Mixer*, 16 Cal. 574; *Branch v. Branch*, 6 Fla. 315.

⁸ *Patchen v. Wilson*, 4 Hill, 59; *Carlisle v. Burley*, 3 Gr. (Me.) 250; *Hollis v. Smith*, 10 East. 293.

⁹ *Jamieson v. Capron*, 95 Pa. 15.

ner may bring replevin in his individual name for firm property.¹

§ 425. **The action must be brought in name of real party in interest.** It is well settled that an action of replevin cannot be brought in the name of one person for the use of another, for the action involves nothing but legal rights, and if equities are to be settled, another form of action must be resorted to. While the name of the usee might be treated as surplusage, a recovery can only be had where it is shown that the plaintiff is entitled to recover. The usee's title can not be considered in the action, and if the plaintiff have no title, the action must fail.²

§ 426. **Wife may maintain in her own name** the action to recover the possession of exempt property, and consent given by the husband and father to defendant's possession while in jail is no defense, and does not bar the wife's right to the action.³ In Missouri it has been held that a married woman could not maintain replevin in her own name.⁴ And in some states it has been held that where, under the statutes, the husband and wife should be joined as plaintiffs to maintain the action, and the action was started in the name of the wife alone, the husband could be joined as party plaintiff on appeal.⁵ The husband and wife, both being interested in the preservation of exempt property, may join as plaintiffs to replevy it.⁶ In detinue by the wife for her own separate property, the husband is neither a necessary nor a proper party.⁷

§ 427. **A non compos mentis** who has no guardian should bring the action by a next friend. His mental con-

¹ Smith v. Wood, 31 Md. 293.

² Meyer v. Mosler, 64 Miss. 610; Hundley v. Buckner, 6 S. & M. 70; Brown v. Thomas, 28 Miss. 286; Pearce v. Twitchell, 41 Miss. 344.

³ Tucker v. Edwards, 71 Ga. 602.

⁴ Hayes v. Miller, 81 Mo. 424.

⁵ Sherron v. Hall, 4 Lea (Tenn.), 498; Ross v. Draper, 55 Vt. 404; Herzberg v. Sachse, 60 Md. 426.

⁶ Shepard v. Cross, 33 Mich. 96.

⁷ Wortham v. Gurley, 75 Ala. 356; Seibert v. McHenry, 6 Watts, Pa. 301.

dition does not bar his right to maintain replevin.¹ An insane person under guardianship can not maintain replevin in his own name. It must be by guardian.²

§ 428. **Assignment of the right to replevy property—Sale.** Under the common law, the right to bring replevin could not be assigned. The action sounding in tort was not assignable.³ But the tendency of modern decisions is to regard the assignment as a sale of the property, and not as a transfer of a cause of action, as the older decisions regarded it, and to allow the action to be maintained by the assignee.⁴ It may now be regarded as the rule that when the owner of property elects to part with it, and does sell it to one who is competent to acquire title, the wrongful act of a third party shall not be permitted to defeat a contract otherwise valid and complete.⁵ Besides, owners of personal property are not bound to treat the acts of third persons, who invade their rights of property or possession, as a conversion. They may always elect to waive the tort, and in such cases may sell the property, and the purchaser may, after demand, sustain trover or replevin.⁶ The assignee of a note and mortgage, after condition broken, may sustain replevin for the mortgaged property.⁷ Replevin will lie for the possession of mules stolen from the owner in favor of one to whom the

¹ *Jetton v. Smead*, 29 Ark. 372.

² *Hayes v. Miller*, 81 Mo. 424.

³ 1 Ch. Plea. 15; *O'Keefe v. Kellogg*, 15 Ill. 352; *McGoon v. Ankeny*, 11 Ill. 558; *Clapp v. Shepard*, 2 Met. 127; *Nash v. Fredericks*, 12 Abb. Pr. 147.

⁴ *Cummings v. Stewart*, 42 Cal. 230; *Cass v. N. Y. & N. H. R. R.*, 1 E. D. Smith, 522; *DeWolf v. Harris*, 4 Mason, 530; *North v. Turner*, 9 S. & R. (Pa.) 244; *McKee v. Judd*, 2 Kernon, 622; *Hoyt v. Thompson*, 1 Seld. 347; *Hall v. Robinson*, 2 Comst. 295.

⁵ *Hanauer v. Bartels*, 2 Col. 522; *Webber v. Davis*, 44 Me. 147; *Morgan v. Bradley*, 3 Hawks (N. C.), 559; *Lazard v. Wheeler*, 22 Cal. 140; *Cortland v. Morrison*, 32 Me. 190; *Parsons v. Dickinson*, 11 Pick. 354; *Carpenter v. Hale*, 8 Gray (Mass.), 157; *The Brig Sarah, &c.*, 2 Sumn. (U. S. C. C.) 211.

⁶ *Tome v. Dubois*, 6 Wall. (U. S.) 548.

⁷ *Barbour v. White*, 37 Ill. 165; *Hopkins v. Thompson*, 2 Port (Ala.), 434. See *Sawtelle v. Rollins*, 23 Me. 196; *Coghill v. Boring*, 15 Cal. 218.

owner has assigned his right of action therefor.¹ Where property is wrongfully detained, the owner may assign his title thereto, and his assignee can maintain replevin therefor whether he ever had possession of the property or not, whether his property in the goods is absolute or qualified.²

§ 429. **Joint owners must join as plaintiffs.** Where partnership property is levied on under a writ against one only, both partners should join in a replevin suit for possession of the property, and the non-joinder of one may be pleaded in bar. A part owner cannot alone maintain replevin.³ A joint owner of a chattel cannot maintain replevin without joining his co-owners.⁴ Where parties jointly cultivate lands, they may be regarded as joint owners of the crop, and should all join in an action to recover it.⁵ So, when mills are worked on the shares, the owner and occupant are tenants in common, and should join in replevin for the product.⁶

§ 430. **Where property is owned by two jointly, and not susceptible of separation, replevin can only be maintained in the joint name of the two owners, and cannot be brought by one for his two-thirds.**⁷ Where two parties are joint owners of personal property, they should be united as parties plaintiff in an action to recover possession.⁸ So an

¹ *Doering v. Kenamore*, 86 Mo. 588.

² *Lazard v. Wheeler*, 22 Cal. 139.

³ *Fay v. Duggan*, 135 Mass. 242; *Hart v. Fitzgerald*, 2 Mass. 509; *Ladd v. Billings*, 15 Mass. 15; *Kimball v. Thompson*, 4 Cush. 441; *Hackett v. Potter*, 131 Mass. 50; *Reinheimer v. Hemingway*, 35 Pa. St. 432; *Chambers v. Hunt*, 3 Harr. (N. J.) 339; *Co. Litt.* 145 b.; *Wilson v. Fray*, 8 Watts, 25; *De Wolf v. Harris*, 4 Mason, 539; *Kindy v. Green*, 32 Mich. 310.

⁴ *Corcoran v. White*, 146 Mass. 329 (15 N. E. 636); *Wright v. Bennett*, 3 Barb. 455; *Wilson v. Gray*, 8 Watts, 36.

⁵ *Putnam v. Wise*, 1 Hill, 235.

⁶ *Rich v. Penfield*, 1 Wend. 379.

⁷ *Collier v. Yearwood*, 5 Bax. (Tenn.) 581. This was replevin for two-thirds of some cotton in bulk; the other third belonged to a stranger to the suit, and a stranger to execution proceedings also.

⁸ *Seip v. Tilghman*, 23 Kan. 289.

agent having authority, by agreement, over property belonging to several joint owners, may maintain replevin against one of them if the authority given him be irrevocable; if not, the refusal to let him have it would be treated as a revocation of his authority.¹

§ 431. **Defendants generally.** As the action of replevin sounds in tort, the person who actually detains the property should be made the defendant,² though, where one person acts in good faith as the agent of another, the courts have sometimes allowed the principal to be made defendant. The decisions are by no means uniform on this question, as will be seen presently. As the plaintiff cannot tell certainly by what right one interfering with his right of possession claims to act, the only safe way is to make the person interfering with his right of possession the defendant, and let him plead his agency, or official character, as a defense, if he be not acting for himself. The defendant must have actual possession of the chattel, or constructive possession thereof, which is the same in law. If he have neither, he is not a proper defendant, and cannot be subjected to costs, and no order can be made regarding the property.

§ 432. **Who is the proper defendant.** Any person having the unlawful possession of personal property belonging to another is the proper party from whom to replevy it, whether he claims it as owner, agent, administrator, trustee, custodian, or in another capacity. An administrator as such cannot commit a tort, and any tort committed by him is committed and renders him liable individually.³ But it will not lie against one holding merely as the servant of another, and claiming no interest or right himself.⁴ To be protected, the agent should state on demand the character of his possession, and for whom he is acting. A creditor,

¹ *Rich v. Rider*, 105 Mass. 307. See *Hunt v. Rousmanier*, 8 Wheat. 174; *Roberts v. Wyatt*, 2 Taunt. 268.

² *Berghoff v. McDonald*, 87 Ind. 549.

³ *Rose v. Cash*, 58 Ind. 278.

⁴ *McDougall v. Travis*, 24 Hun. 590.

at whose suit an attachment is levied upon goods not the property of his debtor, is not liable in replevin for the goods attached, either alone or jointly with the attaching officer.¹ The action of replevin sounds in tort, and an agent who, for his principal, wrongfully detains the goods of another, is personally liable in the action.² In replevin, parties cannot, with any propriety, be made-defendants merely because they claim "some interest" in the property in controversy, but have none, and a general denial by such a defendant makes no issue to try.³ Replevin is essentially a possessory action, and does not lie against one who is not, either actually or constructively, in possession of the property described in the complaint.⁴ If B sell goods to A by a conditional sale, and afterward take possession of them for an alleged breach of condition, and sell them to C, in whose possession they are when taken by A, by a writ of replevin, B is not a proper party defendant to this replevin suit against C.⁵

§ 433. **Defendant must have possession at the time the suit was commenced.** Where the defendant in the writ of replevin was not in possession of the things sued for at the time the writ issued, and refused to give bond, no recovery can be had against him, though unauthorized persons gave a bond of redelivery and received the property.⁶ One who does not claim property, but offers to surrender it, cannot be made liable in a replevin action, and the fact that after it was taken in replevin he gave a bond and retained it does not enable plaintiff to maintain the action against him.⁷ Where defendant after his refusal to deliver the cow to plain-

¹ Blatchford v. Boyden, 18 Bradw. (Ill.) 378; Richardson v. Reed, 4 Gray, 441.

² Berghoff v. McDonald, 87 Ind. 549.

³ Van Gorder v. Smith, 99 Ind. 404.

⁴ Baer v. Martin, 2 Ind. 229; Carpenter v. Starr, 1 Mackey (D. C.), 417.

⁵ Swett v. Boyce, 134 Mass. 381; Hall v. White, 106 Mass. 599; Richardson v. Reed, 4 Gray, 441.

⁶ Myers v. Credle, 63 N. C. 504.

⁷ Church v. Frost, 3 Thomp. & C. (N. Y.) 318.

tiff, but before the plaintiff could procure the writ, drove the cow from his premises, replevin cannot be maintained against him. The plaintiff must show that at the time the writ issued the property was in the defendant's possession.¹ Replevin cannot be maintained against a person who has no possession or control of the goods to be replevied. Replevied goods cannot be restored and returned to a person from whom they were not taken, and such person cannot rightfully be made a defendant, sole or joint, in an action of replevin.² A party cannot be made liable in an action of replevin if he was not in possession of the property when the action was begun, and did not claim any interest in it, or collude with a co-defendant in regard to it.³

§ 434. **But will lie against one having the legal title, though the property has not been moved by him.** Replevin will lie against the assignee of property, even though he allow it to remain in the assignor's hands, unless he clearly make known that he does not claim it.⁴

§ 435. **But if he wrongfully took it and disposed of it to avoid the replevin, the suit will lie, and such a person is a proper sole defendant.**⁵ One wrongfully detaining property and refusing to give it up may be sued in replevin, though he has parted with it before trial.⁶ Ordinarily, an action of detinue can only be maintained against the person who has possession of the chattel at the commencement of the suit. It might, perhaps, be maintained against one who had wrongfully transferred it to avoid the action by the owner.⁷

¹ Rogers v. Davis, 21 Mo. App. 150.

² Hall v. White, 106 Mass. 599; Richardson v. Reed, 4 Gray, 441.

³ Ramsdell v. Berswell, 54 Me. 546.

⁴ Coomer v. Gale Mfg. Co., 40 Mich. 691.

⁵ Layward v. Warren, 27 Me. 453; Badger v. Phinney, 15 Mass. 359; Baker v. Fales, 16 Mass. 147; Schmidt v. Bender, 39 Kan. 437 (18 P. 491).

⁶ Harkey v. Tillman, 40 Ark. 551; Washington v. Love, 34 Ark. 93; Nichols v. Michael, 23 N. Y. 266; Brockway v. Burnap, 16 Barb. N. Y. 309.

⁷ Lightfoot v. Jordan, 63 Ala. 224; Gelbreath v. Jones, 66 Ala. 129; Henderson v. Feltz, 58 Ala. 590; Graham v. Myers, 74 Ala. 432.

§ 436. **An officer who levies on property wrongfully is the proper defendant, and not the party he represents—Constructive possession.** Where an officer returned that he *levied on the right, title, and interest* of the judgment debtor in certain property, and notified the person, in whose possession it appeared to be, of his levy, but did not move it or take other possession, *held*, that he had sufficient possession of the goods to sustain an action of replevin against him by the owner.¹ The sheriff holding the writ of attachment is the proper defendant in replevin, and not the attachment plaintiff.²

§ 437. **The same—Execution—Constructive possession.** The plaintiffs in execution are not necessary or even proper parties to the replevin suit.³ Where a constable levied an execution on standing corn and notified the plaintiff of what he had done, *held*, that the constable had such a possession that replevin would lie against him, and that he was estopped to deny that he had the property in his possession.⁴ Where an officer, under a general promise of indemnity from an execution plaintiff, but without directions to levy upon specific property, has taken chattels in execution under a void judgment, the execution plaintiff not having had such goods in his actual possession or control, is not liable, either separately or jointly, with the officer in replevin.⁵ But where the sheriff has sold the property under his writ, and delivered possession to the purchaser, he is no longer a proper party to a replevin suit by the true owner.⁶ In Connecticut replevin

¹ Waid v. Gaylord, 4 Thomp. & C. (N. Y.) 41; Alvord v. Haynes, 13 Hun. (N. Y.) 26; Stewart v. Wells, 6 Barb. 79; Knapp v. Smith, 27 N. Y. 277; Richardson v. Reed, 4 Gray, Mass. 441; Ladd v. North, 2 Mass. 516; Maxon v. Perrott, 17 Mich. 332.

² Maxey v. White, 53 Miss. 80; Griffin v. Lancaster, 59 Miss. 340; Brockway v. Burnap, 12 Barb. 347; Grace v. Mitchell, 31 Wis. 533; Richardson v. Reed, 4 Gray, 441; Gallagher v. Bishop, 15 Wis. 276.

³ Blatchford v. Boyden, 122 Ill. 657 (13 N. E. 801).

⁴ Godfrey v. Brown, 86 Ill. 454. See Hadley v. Hadley, 82 Ind. 75; Id. 95; Louthain v. Fitzer, 78 Ind. 449.

⁵ Grace v. Mitchell, 31 Wis. 533.

⁶ Moses v. Morris, 20 Kan. 208. See Eaton v. Munroe, 52 Me. 63.

cannot be brought against the attaching officer, but must be brought against the plaintiff in attachment whom the officer represents.¹ The same rule has held in Indiana.²

§ 438. **Constructive possession—Mere paper levy insufficient.** A replevin suit before a justice was dismissed for want of a sufficient bond, and a judgment of return entered. Without first restoring the property, the plaintiff began another suit. Taking the property and going with the officer, he returned it to defendant and then demanded it of him, and, on refusal, the officer seized it under his writ. *Held*, that when the second suit was commenced the property was constructively in the defendant's possession, and that actual possession is not necessary to make one a proper defendant in a replevin suit.³ A mere paper levy by a county treasurer on chattels for delinquent taxes, without taking actual possession, or taking a delivery bond for it, or putting some one in charge, is not a possession by him which will sustain replevin against him.⁴

§ 439. **Power and authority of the officer as a defendant in such cases.** An officer who has seized goods by virtue of legal process is a merely nominal defendant to an action of replevin for them, and, unless the real party in interest has refused to indemnify him, cannot prejudice the latter's rights by stipulating with the plaintiff to dismiss the suit without judgment.⁵ In an action against a sheriff for the recovery of property taken under an execution, the sheriff is not only the actual, but the real party defendant, where the

¹ McDonald v. Holmes, 45 Conn. 157; Bowen v. Hutchins, 18 Conn. 550; Hathaway v. St. John, 20 Conn. 343. This is contrary to the general rule, and is regulated by the code. *Per contra*, see Mitchell v. Roberts, 50 N. H. 486, and cases cited, and Cary v. Hotailing, 1 Hill, 311.

² Firestone v. Meshler, 18 Ind. 439.

³ Teeple v. Dickey, 94 Ind. 124; Louthain v. Fitzer, 78 Ind. 449; Hadley v. Hadley, 82 Ind. 75.

⁴ The Standard Oil Co. v. Bretz, 98 Ind. 231.

⁵ Casper v. Kent, Circuit Judge, 45 Mich. 251 (7 N. W. 816).

judgment creditor makes no application to be made defendant, and is not substituted as the defendant.¹

§ 440. Where judgment plaintiff directs the officer to levy on specific property, he is liable, and replevin may be brought against him alone.² It has been held that a person who is plaintiff in attachment or execution, and goes with the officer, and insists that he levy on certain property, not the property of the defendant in the writ, may be made the sole defendant in an action of replevin by the true owner for the property.³ But it has been held that it would not lie against the attachment plaintiff alone or against him jointly with the attaching officer,⁴ and the reasoning of Mr. Justice Metcalf is certainly sound. He says: "In our opinion, replevin cannot be maintained in this commonwealth against a person who has no possession or control of the goods to be replevied. Replevied goods cannot be restored and returned to a person from whom they were never taken, and such person cannot rightfully be made a defendant, sole or joint, in an action of replevin."

§ 441. Co-defendants—Who may be. The execution plaintiff may be with the officer when he has the goods replevied in his possession, or they are upon his premises.⁵ While the person in possession of personal property is the only proper defendant, the joinder of a person not in possession as a defendant is a defect which may be cured by striking out the misjoined defendant.⁶ It is proper to join an officer and his custodian as defendant in a replevin suit.⁷

¹ Hoisington v. Brakey, 31 Kan. 560.

² Myers v. Credle, 63 N. C. 504; Knapp v. Smith, 27 N. Y. 277; Allen v. Crary, 10 Wend. (N. Y.) 349.

³ Tripp v. Leland, 42 Vt. 487; Allen v. Crary, 10 Wend. 349. In the Tripp case the court base their decision partly on the ground that defendant claimed the property by an independent title also.

⁴ Richardson v. Reed, 4 Gray, 441; Skilton v. Winslow, Id.

⁵ McMillan v. Larned, 41 Mich. 521; Valle v. Cerre, 36 Mo. 575; Esty v. Love, 32 Vt. 744.

⁶ Herzberg v. Sachse, 60 Md. 426.

⁷ Tuttle v. Robinson, 78 Ill. 332.

Where two parties are connected with the detention of the property, it is proper to join them as defendants.¹ The action of claim and delivery is properly brought against the parties by whom the property sought is wrongfully detained.² A party interested in the result of a suit in replevin may be made a party defendant.³ The plaintiff in the execution may be a party defendant in a replevin suit against an officer, but, if he claims nothing in his answer, no costs can be taxed against him.⁴ A national bank that makes a loan upon the security of a warehouse receipt for merchandise is a proper defendant to a suit in replevin, by the consignor and owner of the merchandise, against the warehouse keeper to whom the same has been committed by the consignee for storage.⁵

§ 442. **One of two wrongdoers may be sole defendant.** Where one of two partners distrained a cow, and replevin was brought against the other partner, who did not expressly disclaim the detention or the act of his co-partner, *held*, that the action was properly brought, as he was jointly interested in the damage to recover which the distraint was made.⁶ Where a father, who was assisting his son at haying, took up cattle found on the son's premises, and confined them on the son's premises, and both father and son refused to surrender them on demand, *held*, that action of replevin was properly maintainable against the son alone.⁷

§ 443. **The one having the actual possession the proper defendant, though acting for another.**⁸ Replevin will lie against one who has control of property, although it is in the hands of another.⁹ A possessory warrant will lie against anyone who receives or takes possession of a personal chat-

¹ Deyoe v. Jamison, 33 Mich. 94.

² Bennett v. Schuster, 24 Minn. 383.

³ Hull v. Jenness, 6 Kan. 361.

⁴ Furrow v. Chapin, 13 Kan. 107.

⁵ Cleveland v. Shoeman, 40 Ohio St. 176.

⁶ Riley v. Noyes, 44 Vt. 455.

⁷ Rowe v. Hicks, 58 Vt. 18 (4 Atl. 563).

⁸ Flatner v. Good, 35 Minn. 395 (29 N. W. 56).

⁹ Bradley v. Gamelle, 7 Minn. 331.

tel under a pretended claim and without lawful warrant or authority. Where the writ issued against the husband for a canary bird, and it appeared that the bird was under his control, it was sufficient, though his wife had the personal, actual care of the bird.¹

§ 444. **Intervention, change, and substitution of new defendants—Lienholders—Costs.** A party claiming a lien as by mortgage on property taken in replevin will be allowed to intervene and set up his claim.² A landlord who has a lien for rent may be made a party defendant, and his lien may be asserted in an action of replevin, in which the tenant's goods have been seized by an alleged owner.³ In a replevin action, all parties having an interest in the subject in controversy may be made parties plaintiff or defendant on the order of the court.⁴ Co-heirs or joint tenants, with defendant in replevin, may come in and defend an action abated by his death.⁵ A corporation chartered and organized in a sister state may be made party defendant to an action of replevin in place of its agent, against whom the action is brought, and may recover in said action the value of the property replevied.⁶ Where replevin is brought for property against one who has bought the property under a warranty of title, and the warrantor pays back to defendant on demand the purchase money, it is proper for the court to substitute this warrantor as the defendant in the replevin action instead of the original defendant.⁷ A third party claiming the ownership of replevied property has the right to be made a defendant in the suit, and assert his claim. And in his answer he does not have to state the evidence of his title, but it is sufficient if he assert title in himself and deny

¹ Manning v. Mitcherson, 69 Ga. 447.

² Albright v. Brown, 23 Neb. 136 (36 N. W. 297).

³ Edwards v. Cottrell, 43 Iowa, 194.

⁴ Earle v. Burch, 21 Neb. 702 (33 N. W. 254).

⁵ Talvonde v. Cripps, 2 McCord (S. C.), 164.

⁶ Hanna v. International Petroleum Co., 23 Ohio St. 622.

⁷ Vinton v. Mansfield, 48 Conn. 474.

plaintiff's title or right to possession.¹ In an action of replevin, plaintiff, to whom the property had been delivered, established title in himself to only a portion of the same, and redelivered the balance to the alleged owners thereof. *Held*, that there is no such thing as a vicarious right of replevin; that the alleged owners had an absolute right to be joined as parties to the action, and that they must be brought in before the title to such property could be litigated.² To an action of replevin by a mortgagee against an officer who has levied writs of attachment on the property, the creditor may be made a party defendant at his request, and may enforce his right to relief by counter claim.³ It is not necessary for a mortgagor to be made a defendant in a suit by the mortgagees against the vendees for the mortgaged property.⁴ In replevin by a mortgagee of chattels against a trustee, under an assignment by the mortgagor for the benefit of creditors, a creditor as such is not a proper defendant, and it is error to admit him as a defendant.⁵ A surety upon a redelivery bond, given by a defendant in replevin for the detention of the property, is not a party to the action or privy thereto, and has no right to control the action.⁶

§ 445. **A trial of the right of property cannot be turned into an action of replevin** by substituting new pleadings and making other parties, but a writ of replevin must issue regularly and bond be regularly taken.⁷

§ 446. **Intervention—Substitution.** On the trial of an inter plea in an action of replevin, no verdict or judgment for either property or money (except for costs) can be rendered against the interpleader where the property has never been delivered to him.⁸ A plaintiff cannot recover against a person

¹ *Hamilton v. Duty*, 36 Ark. 474.

² *Wilde v. Paschen*, 67 Wis. 90 (30 N. W. 279).

³ *Morgan v. Spangler*, 2 Ohio St. 38.

⁴ *Person v. Wright*, 35 Ark. 169.

⁵ *Antrim v. Gilson*, 79 Ind. 339.

⁶ *Boyd v. Moore*, 34 Kan. 119 (8 Pac. 255).

⁷ *Douglas v. Newman*, 5 Bradw. (Ill.) 518.

⁸ *Chandler v. Smith*, 34 Ark. 527.

who, after the issuing of the writ, appears and claims the property, and receives it upon giving bond. The obligor by giving bond does not become a party to the replevin suit.¹ Where the plaintiff brought suit in replevin as the mother of the real parties in interest, asserting no right in herself, and subsequently the children, by their guardian *ad litem*, filed a complaint setting up the same cause of action, the subsequent appearance was not an intervention, but merely a substitution; and a stipulation made by the first plaintiff will bind the second.²

¹ Myers v. Credle, 63 N. C. 504.

² Temple v. Alexander, 53 Cal. 3.

CHAPTER XXI.

DEMAND AND TENDER TO DISCHARGE LIEN.

	Section.		Section.
Demand necessary—When —		Acts of dominion on part of	
Rule	447	defendant will excuse de-	
Reason of the rule—Plea of ti-		mand	459
tle in defendant waives de-		Title of record no excuse for .	460
mand	448	Assignee must give notice and	
Effect of demand and refusal	449	make demand	461
When both parties claim an		Demand must be made where	
absolute title, demand not		plaintiff put property in de-	
necessary	450	fendant's possession, and he	
Want of demand must be		merely allows it to remain	462
taken advantage of in time		Not necessary where trespass	
—Willingness to surrender	451	committed in the taking—	
Office of demand—By whom		Stolen goods	463
made	452	That the possession of the de-	
Where plaintiff relies upon a		fendant is in good faith of	
wrongful detention and tak-		no avail if original taking	
ing, demand unnecessary .	453	was fraudulent	464
Demand necessary when title		Where possession obtained by	
is acquired in good faith		fraud, demand is unneces-	
for value, but not neces-		sary	465
sary where title is acquired		To be protected, an officer	
in fraud	454	must keep strictly within	
Demand not usually neces-		the command of his writ .	466
sary to sustain replevin on		Demand need not be made on	
ground of wrongful deten-		wrongdoer, but must on a	
tion	455	<i>bona fide</i> holder—Demand	
Not necessary against an in-		on agent of limited author-	
nocent purchaser of a fraud-		ity insufficient—Waiver of	
ulent vendee—Necessary to		demand	467
terminate a right of posses-		To recover costs, demand	
sion	456	must be made—Waiver of	
When a rightful possession		demand—A general denial	
becomes wrongful — When		not	468
demand necessary	457	Possession of goods by mis-	
When the original taking is		take—Lien	469
not wrongful, demand must		Taker up of strays—orto save	
be made	458	property	470

Section.	Section
Necessary from a borrower of lost goods 471	Where property taken under an illegal mortgage, demand not necessary by the owner 494
Possession acquired in good faith—Demand necessary . 472	Also where plaintiff repudiates a delivery made under a void agreement 495
But a contrary rule has been laid down 473	Must be made of a purchaser at an execution sale, or an officer 496
Conversion—Refusal to de- liver in advance of demand 474	When demand of an officer proceeding under a writ of attachment or other pro- cess is necessary—Execution 497
Excuse for not complying with demand—True reason . . 475	When the property of a stran- ger to the writ is sold . . 498
When demand should be made—When action com- menced 476	But where property is found by the officer in the actual custody of the defendant in execution 499
Demand after affidavit signed —Defective, how cured . 477	In replevin for exempt prop- erty 500
Demand after issuance of writ 478	But purchaser when entitled to demand 501
Proof of—when made . . 479	Conditional sale—Part pay- ment 502
Time when demand should be made—where defendant has a right for a limited time . 480	Fraud by vendee—Attaching or other creditor—No de- mand necessary 503
A demand of one not having authority 481	Vendee must make demand of third party in possession . 504
If proved, failure to allege is cured after trial 482	When demand necessary to put the vendor in the wrong 505
Written demand must be spe- cific 483	If vendee's possession lawful, demand must be made . . 506
Of person in charge sufficient —In case of decedent . . 484	But if he violate the contract of sale, not 507
Acts and notice equivalent to demand—Intervenor . . 485	Purchaser must demand and tender amount of his bid . 508
Of the indices of ownership sufficient 486	Same of sheriff's sale . . 509
A demand made in violation of an injunction 487	Sufficient demand, claim of ownership by defendant—A waiver 510
A mortgagee of chattels must make demand of an officer . 488	Where a person known to be an agent exceeds his author- ity 511
Mortgagee must make de- mand of one in possession— Absconded mortgagor . 489	Not necessary where bailee
Action against sheriff . . 490	
Action by mortgagee v. mort- gagor 491	
Trustee after default need not demand 492	
A mortgagor to replevy back must demand 493	

	Section.		Section.
wrongfully sells property or converts it	512	Of note or property received in payment	517
The manner of defendant's possession does not affect the necessity of demand . .	513	Tender must be unconditional	518
Tender when necessary to discharge lien before suit brought against common carrier	514	So must refusal	519
The same—What issues triable—Offset	515	Tender before action brought	520
Excessive charges—Tender of proper amount	516	Where defendant has a lien—	
		Inn-keeper or carrier	521
		Landlord's lien—Mortgagee . .	522
		Where a tradesman has a lien	523
		Expenses advanced under a wrongful levy cannot be recovered	524

§ 447. **Demand necessary when—Rule.** The decisions upon the question when a demand is necessary are neither uniform nor entirely reconcilable; but I think the better doctrine is that a demand is only required when it is necessary to terminate the defendant's right of possession, or to confer that right upon the plaintiff; but when the plaintiff claims the ownership of the property, and the right of possession as incident to that ownership, and the defendant's right claimed is precisely the same, no demand is necessary.¹ If the property claimed by a person is in the rightful possession of another, as where it was delivered to him by the owner, or where he has innocently purchased the same from one who obtained it wrongfully, it is usually required that a demand of the property be made before an action of replevin *in the detinet* is brought, and in some states this is required by statute.² A failure to demand where demand is necessary prevents the recovery of costs at least.³

¹ *Lamping v. Kunon*, 9 Col. 390 (12 Pac. 434); *Smith v. McLean*, 24 Iowa, 322; *Eldred v. Oconto Co.*, 33 Wis. 140; *Shoemaker v. Simpson*, 16 Kan. 43; *Pyle v. Warren*, 2 Neb. 241; *Homan v. Laboo*, 1 Neb. 204.

² *Millsbaugh v. Mitchell*, 8 Barb. (N. Y.) 333; *Talcott v. Belding*, 46 How. (N. Y.) 419; *Connor v. Comstock*, 17 Ind. 90; *Rawley v. Brown*, 18 Hun. (N. Y.) 456; *Roberts v. Berdell*, 61 Barb. 37 (52 N. Y. 644); *Gillett v. Roberts*, 57 N. Y. 28; *Darling v. Tegler*, 30 Mich. 54; *Ingalls v. Bulkley*, 13 Ill. 315; *Railroad Co. v. Noe*, 77 Ill. 513; *Windsor v. Boyce*, 1 Houst. (Del.) 605; *Dearing v. Ford*, 21 Miss. 269.

³ *Homan v. Laboo*, 1 Neb. 210; *Gilchrist v. Moore*, 7 Iowa, 9; *McNeil*

§ 448. **Reason of the rule—Plea of title in defendant waives demand.** The rule which requires demand is a technical one. The reason of it is that the law presumes that the party in possession of property not his own will respect the rights of the true owner when informed of them, and that upon demand being made he will surrender without suit. But where defendant pleads ownership in himself he cannot defeat a recovery under the pretence that he would have surrendered the property if demand had been made.¹ Where the defendant came into possession rightfully, the law presumes that possession to be rightful until he does some act inconsistent with that presumption, or until some other person with a better right to possession attempts to assert that right by a demand which defendant refuses to comply with.² Where the defendant in replevin with the general issue pleads property in himself, it is not necessary to prove demand previous to the suing out of the writ.³ Where a defendant in a replevin action places his defense upon title in himself and the right of possession incident thereto, and does not rely on want of demand by the owner, and it appears that a demand would have been vain and unavailing if made, no proof of demand and refusal is required.⁴

§ 449. **A demand and refusal is not a conversion.** The demand is an assertion by the plaintiff that he claims the immediate right to possession. The refusal is a denial of plaintiff's right to the same, and is interpreted by the law as a declaration on the part of the person refusing that he intends to make use of the property for his own benefit, and for this the law will hold him responsible as for an actual

v. Arnold, 17 Ark. 154; *Bolon v. O'Brien*, 20 Mich. 304; *Lewis v. Masters*, 8 Blackf. 244; *Prinn v. Cobb*, 63 Me. 200.

¹ *Myrick v. Bell*, 3 Dak. 284 (17 N. W. 268).

² *Woodward v. Woodward*, 14 Ill. 466; *Pringle v. Phillips*, 5 Sandf. (N. Y.) 161; *Poole v. Adkisson*, 1 Dana (Ky.), 110.

³ *O'Neil v. Bailey*, 68 Me. 429; *Homan v. Laboo*, 1 Neb. 210; *Morris on Replevin*, § 78; *Newell v. Newell*, 34 Miss. 385.

⁴ *Roper v. Harrison*, 37 Kan. 243 (15 P. 219).

conversion. Proof of an actual conversion will always obviate the necessity of proving a demand and refusal.¹ When the defendant has notice of plaintiff's rights, any act done for the purpose of defeating them will amount to a conversion, and no demand need be made; but when defendant acts innocently, in ignorance of plaintiff's claim, he is usually entitled to demand.²

§ 450. **Where both parties claim an absolute title, demand not necessary.** Where both parties claim title to personal property, and the right of possession thereunder, a demand is not necessary to enable either to maintain replevin against the other.³ Where plaintiff's right is contested by defendant on a claim of a superior right, the defendant cannot set up a want of demand as a reason for his failure to surrender.⁴ This claim of ownership by defendant is inconsistent with the theory that he might have surrendered them on demand, and removes the necessity for demand if one had been necessary.⁵ Where the defendant in replevin with the general issue pleads also property in himself and in third parties whose bailiff he is, avows the taking and demands a return, it is not necessary for the plaintiff to prove a demand for the goods previous to suing out the writ of replevin.⁶

§ 451. **Want of demand must be taken advantage of in time—Willingness to surrender.** But this want of notice or demand, must be taken advantage of at the proper time.

¹ *Savage v. Perkins*, 11 How. Pr. 17; *Perkins v. Barnes*, 3 Nev. 557; *Bruner v. Dyball*, 42 Ill. 35; *Lockwood v. Bull*, 1 Cow. 322; *Hill v. Covel*, 1 Comst. (N. Y.) 523; *Jessup v. Miller*, 1 Keyes (N. Y.), 321; *Bristol v. Burt*, 7 Johns. 257; *Gilmore v. Newton*, 9 Allen (Mass.), 171; *Morris v. Pugh*, 3 Burr, 1241.

² *Kennet v. Robinson*, 2 J. J. Marsh (Ky.), 84. This is a very interesting case on what acts constitute a conversion.

³ *Smith & Co. v. McLean*, 24 Iowa, 322; *Redding v. Page*, 52 Iowa, 406 (3 N. W. 427).

⁴ *Myrick v. Bill*, 3 Dak. 284 (17 N. W. 268).

⁵ *Seaver v. Dingley*, 4 Greenl. (Me.) 307; *Pierce v. Van Dyke*, 6 Hill, 613; *Perkins v. Barnes*, 3 Nev. 557; *Cranz v. Kroger*, 22 Ill. 74; *Newell v. Newell*, 34 Miss. 385; *Smith v. McLean*, 24 Iowa, 337.

⁶ *Lewis v. Smart*, 67 Me. 206; *Seares v. Dingley*, 4 Me. 306.

After the case has been submitted, it is too late.¹ If defendant desire to rely upon the omission to make demand, he should show a willingness to surrender upon proper demand made.²

§ 452. **Office of demand—By whom made.** The office of a demand may be, not to make the defendant's possession wrongful, but to furnish evidence that it is wrongful. In such case it is unnecessary that it be made by the plaintiff, but demand by another and refusal may be shown as evidence of the wrongful detention.³ A demand by a father or one who stands in *loco parentis* is sufficient for property of his minor children.⁴ A demand serves no purpose except to establish a conversion or a wrongful detention. When that can be established without showing a demand, a demand is unnecessary. When, therefore, the defendant in his answer admits the detention and claims title in himself, the title alone is put in issue, and no demand need be shown.⁵ Demand serves only to establish a conversion or wrongful detention, and when that can be established without showing a demand, demand is not necessary.⁶

§ 453. **Where plaintiff relies on a wrongful detention and taking, demand unnecessary.** Where the complaint alleges property in plaintiff and that defendant wrongfully detains it, it is not necessary to allege a demand, and plaintiff may prove either a wrongful taking, a demand and re-

¹ *Warder v. Hoover*, 51 Iowa, 491; *Homan v. Laboo*, 1 Neb. 207.

² *Homan v. Laboo*, 1 Neb. 207.

³ *Brown v. Poland*, 54 Conn. 313 (7 Atl. 719); *Lathrop v. Locke*, 59 N. H. 532; *Cass v. N. Y. & N. H. R. R.*, 1 E. D. Smith, 522.

⁴ *Newman v. Bennett*, 23 Ill. 428; *Smith v. Williamson*, 1 Har. & J. (Md.) 147.

⁵ *Perkins v. Barnes*, 3 Nev. 557; *Seaver v. Dingley*, 4 Greenleaf, 306; *Francisco v. Benepe*, 6 Mont. 242.

⁶ *Perkins v. Barnes*, 3 Nev. 557; *Woodworth v. Knowlton*, 22 Cal. 164; *Ledby v. Hays*, 1 Cal. 160; *Hecks v. Britt*, 21 Mich. 422; *Latimer v. Wheeler*, 30 Barb. 485; *Pease v. Smith*, 61 N. Y. 477; *Gillett v. Roberts*, 57 N. Y. 28; *Shoemaker v. Simpson*, 16 Kan. 43; *Strong v. Bank*, 45 N. Y. 718; *Lawrence v. Maxwell*, 53 N. Y. 19; *Toft v. Chapman*, 50 N. Y. 445; *Laverty v. Snethen*, 68 N. Y. 522.

fusal, or facts which render a demand unnecessary where the original taking was lawful.¹ Where one who has no title retains goods in his possession under claim of ownership, his possession is wrongful, and no demand is required.² Where the plaintiff's case depends upon a wrongful detention without a wrongful taking, an averment in the complaint of a demand and refusal is necessary.³ Where the taking of the property was wrongful, and the action is the common law remedy of replevin *in the cepit*, it is not generally necessary to show a demand before the action was brought, and if the defendant assert a right to the property, though it was not wrongfully obtained, no demand by the plaintiff and refusal to deliver by the defendant need be shown. As a general rule, whenever the action of trover or other equivalent action could be maintained without demand, replevin will lie without demand.⁴

§ 454. Demand necessary when title is acquired in good faith for value, but not necessary where title is acquired in fraud. As against a fraudulent vendee, and as against one obtaining possession under such vendee, in bad faith and without value, the bringing of the suit is a sufficient demand. In many cases of fraudulent purchases a demand before suit would be impracticable or very difficult, and might tend to defeat the vendor's right to reclaim his property. In case, however, of a *bona fide* purchaser for value, if the original vendor can reclaim the property from

¹ Oleson v. Merrill, 20 Wis. 462.

² Oswald v. Hutchinson, 26 Ill. App. 273.

³ Scofield v. Whitelegge, 49 N. Y. 259; Stillman v. Squire, 1 Denio, 328; Pringle v. Phillips, 5 Sandf. 157; Zachrisson v. Ahman, 2 Sandf. 68; Pierce v. Van Dyke, 6 Hill, 613; Lewis v. Masters, 8 Blackf. 245; Cummings v. Vorce, 3 Hill, 282; Oleson v. Merrill, 20 Wis. 462; Paul v. Luttrell, 1 Col. 320.

⁴ Clark v. Lewis, 35 Ill. 417; Butters v. Haughwout, 42 Ill. 18; Tuttle v. Robinson, 78 Ill. 332; Prime v. Cobb, 63 Me. 200; Blanchard v. Child, 7 Gray (Mass.), 155; Whitney v. McConnel, 29 Mich. 12; Trudo v. Anderson, 10 Mich. 357; Delancy v. Holcomb, 26 Iowa, 94; Purver v. Moltz, 32 How. (N. Y.) 478; Field's Briefs, § 200.

him at all, it can be done only after demand and a reasonable time to comply with the demand.¹ Where it is apparent that defendant shifted the property for the purpose of preventing the plaintiff from getting the property on replevin, it is not necessary that actual manual possession of the property in defendants be shown, nor is it necessary that demand of him be shown.²

§ 455. **Demand not usually necessary to sustain replevin on ground of wrongful detention.** In an action of replevin for wrongful detention, proof of demand and refusal is necessary to establish such detention.³ It is not often that a demand is necessary to sustain an action of replevin for an unlawful detainer of goods. Where the defendant has the goods by leave of the plaintiff, a demand may be necessary to establish wrongful detention, but wherever, without such demand, there is a wrongful possession of goods, as where they were obtained by force, fraud, or otherwise, without the owner's consent, no demand need be made.⁴ In an action to recover personal property or its value, where it appears that the property came lawfully into the possession of the defendant, a demand and refusal to deliver must be shown.⁵ But this rule does not extend to stolen goods, nor has it been uniformly adhered to at all times by the courts.⁶ If goods be found in the possession of a thief or trespasser

¹ *Lynch v. Bucher*, 38 Conn. 490; *Woodruff v. Adams*, 37 Conn. 233; *Parker v. Middlebrook*, 24 Conn. 207; *Brown v. Fitch*, 43 Conn. 512.

² *Schmidt v. Bender*, 39 Kan. 437 (18 P. 491). Defendants defended on a line wholly inconsistent with the theory that a demand would have been complied with if properly made. See also *Raper v. Harrison*, 37 Kan. 243; *Collier v. Beckley*, 33 Ohio St. 523.

³ *Ingalls v. Bulkley*, 13 Ill. 315; *Windsor v. Boyce*, 1 *Houst. (Del.)* 605.

⁴ *Lewis v. Masters*, 8 Blackf. (Ind.) 244.

⁵ *Bacon v. Robson*, 53 Cal. 399; *Stanchfield v. Palmer*, 4 *Green (Iowa)*, 24; *Wood v. Cohn*, 6 Ind. 455; *Ingalls v. Bulkley*, 13 Ill. 315.

⁶ *Hall v. Robinson*, 2 *Comst. (N. Y.)* 295; *Kelsey v. Griswold*, 6 *Barb.* 440; *Hudson v. Maze*, 3 *Scam.* 582; *Harding v. Coburn*, 12 *Met.* 342; *Riley v. Boston Water Co.*, 11 *Cush.* 11; *Courtis v. Cane*, 32 *Vt.* 232; *Lewis v. Masters*, 8 Blackf. 245.

who has taken them from another thief or trespasser, no demand is necessary.¹ To maintain replevin, the party entitled to possession need not prove demand and refusal if the property was either obtained unlawfully or purchased by a detainer privy to his vendor's fraud.²

§ 456. **Not necessary against an innocent purchaser of a fraudulent vendee, but necessary to terminate a right of possession.** A demand must be shown only where defendant had a right of possession which was liable to be terminated by such demand, and where chattels unlawfully taken from the possession of the owner have passed into the hands of innocent third parties, who purchased, supposing the vendor to be the owner, an action to recover the possession thereof may be maintained without previous demand made. It makes no difference in such a case that the complaint charges merely an unlawful detention, and not an unlawful taking. The plaintiff may still prove the unlawful taking, and thus show that, although no demand was made, the detention was unlawful.³ No demand is necessary against one who is a *bona fide* purchaser of one who had no right to sell. Such purchaser has no lawful possession as against the owner.⁴ No demand is necessary before bringing replevin for property purchased by the defendant at an illegal sale by a pound master.⁵

§ 457. **When a rightful possession becomes wrongful—**
When demand is necessary. Whenever one person obtains possession of the personal property of another without the consent of the owner, and then, without any right which the law will recognize, asserts a claim to the property inconsistent with the owner's right of property and right of possession, the possession of such person will immediately

¹ Barrett v. Warren, 3 Hill (N. Y.), 348.

² Butters v. Haughwout, 42 Ill. 18.

³ Eldred v. The Oconto Co., 33 Wis. 133; Stanley v. Gaylord, 1 Cush. 536; Galvin v. Bacon, 11 Me. 28; Smith v. McLean, 24 Iowa, 322.

⁴ Prime v. Cobb, 63 Me. 200.

⁵ Clark v. Lewis, 35 Ill. 417.

become illegal and wrongful, and no demand for the property will be required to be made by the owner before he commences an action of replevin for the recovery of the same, although the possessor thereof may ever so honestly entertain the belief that his claim to the property is both legal and just.¹

§ 458. **Where the original taking is not wrongful, demand must be made.** Where the original taking is not tortious, but only the unlawful detainer is complained of, a demand of the property before action is essential, unless defendant is claiming or using it as his own.² When the plaintiff relies upon a wrongful detention alone, demand must be made, but when on a wrongful taking and detention, no demand is necessary.³ In Iowa proof of demand is only

¹ *Shoemaker v. Simpson*, 16 Kan. 43; *Trudo v. Anderson*, 10 Mich. 357; *Ballou v. O'Brien*, 20 Mich. 304; *Clark v. Lewis*, 35 Ill. 417; *McNeill v. Arnold*, 17 Ark. 155; *McDonald v. Smith*, 21 Ark. 422; *Galvin v. Bacon*, 11 Me. 28; *Newell v. Newell*, 34 Miss. 386; *Smith v. McLean*, 24 Iowa, 322; *Gilchrist v. Moore*, 7 Clark (Iowa), 11; *Newman v. Jenne*, 47 Me. 520; *Stanchfield v. Palmer*, 4 Greene (Iowa), 25; *Hudson v. Maze*, 3 Scam. 578; *Wood v. Cohen*, 6 Ind. 455; *Conner v. Comstock*, 17 Ind. 90.

² *Person v. Wright*, 35 Ark. 169; *Brown v. Cook*, 9 Johns. 361; *Pierce v. Van Dyke*, 6 Hill, 613; *Sluyter v. Williams*, 1 Sweny (N. Y.), 215; *Boughton v. Bruce*, 20 Wend. 234; *Stanchfield v. Palmer*, 4 Greene (Iowa), 25; *Smith v. McLean*, 24 Iowa, 323; *Gilchrist v. Moore*, 7 Iowa, 11; *Johnson v. Johnson*, 4 Har. (Del.) 171; *Windsor v. Boyce*, 1 Houst. (Del.) 605; *Stapleford v. White*, 1 Houst. 238; *Sopris v. Truax*, 1 Col. 90; *Roach v. Bender*, 1 Col. 322; *Seaver v. Dingley*, 4 Green (Me.), 307; *Newman v. Jenne*, 47 Me. 520; *Piraini v. Barden*, Pike (5 Ark.), 81; *Burr v. Daugherty*, 21 Ark. 564; *Hudson v. Maze*, 3 Scam. 582; *Ingalls v. Bulkley*, 13 Ill. 317; *Root v. Bonnema*, 22 Wis. 539; *Smith v. Welch*, 10 Wis. 91; *Stratton v. Allen*, 7 Minn. 502; *Walpole v. Smith*, 4 Blackf. 306; *Litterel v. St. John*, Id. 327; *O. & M. R. R. v. Noe*, 77 Ill. 512; *Bond v. Ward*, 7 Mass. 127; *Sawyer v. Merrill*, 6 Pick. 478; *Conner v. Comstock*, 17 Harrison (Ind.), 90.

³ *Moser v. Jenkins*, 5 Ore. 447; *Ayers v. Hewett*, 19 Me. 281; *Seaver v. Dingley*, 4 Green (Me.), 314; *Partridge v. Swazey*, 46 Me. 414; *Baldwin v. Cole*, 6 Mad. 212; *Parsons v. Webb*, 8 Me. 39; *Fernald v. Chase*, 37 Me. 292; *Bussing v. Rice*, 2 Cush. 48; *Thurston v. Blanchard*, 22 Pick. 18; *Foshay v. Ferguson*, 5 Hill, 158; *Stillman v. Squire*, 1 Denio, 328; *Cummings v. Vorce*, 3 Hill, 282; *Pierce v. Van Dyke*, 6 Hill, 613; *Trudo*

necessary to terminate the defendant's right of possession where that right was rightfully obtained, and is not necessary where both parties claim title and the right of possession is incident thereto.¹ In Mississippi no demand is required by statute, but if the plaintiff without demand bring suit against defendant, whose original possession was lawful, and the defendant offer to deliver the property with the proper plea, the action of replevin will be discharged at cost of plaintiff.² In Tennessee no demand is necessary under any circumstances, the service of the writ being sufficient demand in all cases.³

§ 459. **Acts of dominion on part of defendant will excuse demand—Conversion.** Where D. and H. both claimed to be the owner of a steer, and D., who had possession, refused to let H. have the animal, and H. separated it from D.'s drove and took it away, D. was allowed to maintain replevin without demand.⁴ No demand is necessary if defendant has exercised continued acts of ownership over it.⁵ Where defendant has converted the property wrongfully taken possession of, no demand is necessary.⁶ So where the circum-

v. Anderson, 10 Mich. 358; *Ballou v. O'Brien*, 20 Mich. 304; *Le Roy v. East Saginaw, &c.*, 18 Mich. 239; *Clark v. Lewis*, 35 Ill. 417; *Bruner v. Dyball*, 42 Ill. 36; *Gibbs v. Jones*, 46 Ill. 320; *Hicks v. Britt*, 21 Ark. 422; *Farrington v. Payue*, 15 Johns. 432; *White v. Brown*, 5 Lans. 78; *Connah v. Hale*, 23 Wend. 462; *Bates v. Conkling*, 10 Wend. 390; *Lewis v. Masters*, 8 Blackf. 246; *Delancey v. Holcomb*, 26 Iowa, 96; *Smith v. McLean*, 24 Iowa, 322; *Lawson v. Lay*, 24 Ala. 188; *Gardner v. Boothe*, 31 Ala. 190; *Oleson v. Merrill*, 20 Wis. 462; *Griswold v. Boley*, 1 Blake (Mont.), 546; *Whitney v. McConnell*, 29 Mich. 13; *Gilmore v. Newton*, 9 Allen, 171; *Stanly v. Gaylord*, 1 Cush. 549; *Henry v. Fine*, 23 Ark. 419; *Courtis v. Cane*, 32 Vt. 232.

¹ *Smith v. McLean*, 24 Iowa, 322.

² *Dearing v. Ford*, 21 Miss. (13 Smead & M.) 269.

³ *Draper v. Moseley*, 3 Bax. (Tenn.) 201.

⁴ *Delancey v. Holcomb*, 26 Iowa, 94.

⁵ *Henry v. Fine*, 23 Ark. 417.

⁶ *Deeter v. Sellers*, 102 Ind. 458 (1 N. E. 854). See *Mitchell v. Williams*, 4 Hill (N. Y.), 16; *Holbrook v. Wight*, 24 Wend. 169. As to just what constitutes a conversion upon the part of the defendant, whose original possession was rightful, the authorities are not very uniform; but there

stances are such as to show that a demand would have been unavailing, no demand is necessary.¹

§ 460. **Title of record no excuse for want of demand.** The fact that plaintiff's title and right of possession appear of record will not relieve him of the necessity of giving notice.²

§ 461. **Assignee must give notice and make demand.** The assignee of goods under an attachment, who pays off the first attaching creditor, must give notice and make demand before he can bring replevin against the officer.³

§ 462. **Demand must be made where plaintiff put property in defendant's possession, and he merely allows it to remain.** The rule of law is well established that where the plaintiff has delivered property to defendant, and defendant merely detains it, it is necessary for plaintiff first to make demand for it, in order to maintain replevin. And in such case a refusal, in order to excuse defendant, must be a qualified refusal based upon reasonable grounds. It must not be absolute; otherwise, he will be guilty of conversion, unless he can establish an adverse right to the immediate possession.⁴ Where the defendant first obtains possession of the property

can be no conversion by defendant unless he had actual control of the property, or actually interfered with it contrary to plaintiff's wishes. The following authorities will throw some light on the question: *Packard v. Getman*, 4 Wend. 615; *Lockwood v. Bull*, 1 Cow. 322; *Jones v. Allen*, 1 Head. (Tenn.) 628; *Gilmore v. Newton*, 9 Allen, 171; *Youl v. Harbottle*, Peak's N. P. Cases, 49; *Presley v. Powers*, 82 Ill. 125; *Kerkham v. Hargroves*, 1 Selw. 425; *Ross v. Johnson*, 5 Burr, 2827; *Dwight v. Brewster*, 1 Pick. 50; *Holbrook v. Wight*, 24 Wend. 169; *Bent v. Bent*, 44 Vt. 634; *Fuller v. Taber*, 39 Me. 521; *Simmons v. Lettystone*, 4 Exch. 442; *Rogers v. Huie*, 2 Cal. 571; *Herron v. Hughes*, 25 Cal. 556; *Hutchins v. Hutchins*, 7 Hill (N. Y.), 104; *Van Valkenburgh v. Thayer*, 57 Barb. 196; *Smith v. Archer*, 53 Ill. 244; *Ripley v. Dolbier*, 18 Me. 382; *Hutchinson v. Bobo*, 1 Baily (S. C.), 546; *Eldredge v. Adams*, 54 Barb. 417; *Bogan v. Stoutenburgh*, 7 Ohio, 213; *State v. Jennings*, 14 Ohio St. 77; *Nelson v. Iverson*, 17 Ala. 219.

¹ *Simpson v. Wrenn*, 50 Ill. 224; *Shoemaker v. Simpson*, 16 Kan. 43; *Smith v. McLean*, 24 Iowa, 322.

² *Peterson v. Espeset*, 48 Iowa, 262.

³ *Whipple v. Thayer*, 16 Pick. (Mass.) 25.

⁴ *Cole v. W. St. L. & P. Ry.*, 21 Mo. App. 443.

with the consent of the plaintiff, the latter must demand the property before he can maintain replevin.¹

§ 463. **Not necessary where trespass committed in the taking—Stolen goods.** Demand need not precede an action of replevin for goods the taking of which by defendant constituted a trespass, unless the trespass has been satisfied or the plaintiff is estopped from asserting it; but where the wrongful taking arises out of contract relations, and defendant holds in good faith, demand is necessary. Demand and refusal before bringing replevin will not make defendant's lawful possession unlawful.² This rule has been carried so far that it has been held that one who innocently purchased at a sale goods that had been stolen was guilty of conversion, and no demand necessary, the purchaser's remedy being against the auctioneer or other salesman for the amount paid by him.³ Demand before bringing replevin is unnecessary where defendant's possession is wrongful,⁴ or where the original taking was wrongful,⁵ or where the owner does not part with it voluntarily. Where the owner of personal property does not part with it voluntarily, but it is tortiously taken from his possession, or any act is done which makes the possession of the person having it wrongful, no demand is

¹ Peake v. Conlan, 43 Iowa, 297.

² Adams v. Wood, 51 Mich. 411 (16 N. W. 788).

³ Hoffman v. Carow, 22 Wend. 285; Courtis v. Cone, 32 Vt. 233; Leonard v. Tidd, 3 Met. 6; Bowen v. Turner, 40 Barb. 383; Spencer v. Blackman, 9 Wend. 167; Everett v. Coffin, 6 Wend. 605; McCombie v. Davies, 6 East. 538; Thorp v. Burling, 11 Johns. 285; Farrar v. Chauffetete, 5 Denio, 527; Williams v. Merle, 11 Wend. 80; Pearson v. Graham, 6 Ad. & Ell. 899; Sprights v. Hawley, 39 N. Y. 441. For a contrary view, see Rogers v. Hine, 2 Cal. 572.

⁴ Bertwhistle v. Goodrich, 53 Mich. 457 (19 N. W. 143). In this case it is held that cattle in anybody's charge are not "running at large," and if on the highway, they are not trespassing on the premises of the adjacent owner. The depasturing of the herbage of the highway is not a nuisance to the adjacent owner, and he cannot impound them.

⁵ Bartels v. Arms, 3 Col. 72; Moorhouse v. Donaca, 14 Ore. 430 (13 Pac. 112).

necessary.¹ Where the property has been wrongfully taken by the defendant from the plaintiff's possession, no demand is necessary to maintain replevin.² Where proved to have been wrongfully taken and wrongfully detained, no demand is necessary.³

§ 464. That the possession of defendant is in good faith of no avail if original taking was fraudulent. In replevin, when the original taking was wrongful, the fact that the defendant came into the possession of the property without any imputation of fraud or intention to do wrong cannot make his possession lawful as against the true owner. The wrongful taker could have no lawful possession against such owner, nor could he convey any to another, and unless a party obtains possession lawfully a demand is not necessary. The necessity of demand is to put the defendant in the wrong when he acquired the possession legally.⁴

§ 465. Where possession obtained by fraud, demand is unnecessary. Where the defendant has deliberately obtained the goods by a fraudulent promise to pay for them, which he did not mean to perform, no demand before bringing the action is necessary.⁵

¹ *Whitman v. Tritle*, 4 Nev. 494; *Stanley v. Gaylord*, 1 Cush. 536, and cases cited; *Riley v. Boston Water Co.*, 11 Cush. 11; *Galvin v. Smith*, 2 Fairfield, 28; *Hyde v. Noble*, 13 N. H. 494; *Trudo v. Anderson*, 10 Mich. 357, and cases cited; *Griswold v. Boley*, 1 Mont. 545.

² *Hamilton v. Browning*, 94 Ind. 242; *Simmons v. Lyons*, 35 N. Y. Sup. Ct. 554; *Cunningham v. Baker*, 84 Ind. 597; *Robinson v. Skipworth*, 23 Ind. 311; *Gilmore v. Newton*, 9 Allen, 171; *Le Roy v. East Saginaw, &c.*, 18 Mich. 233; *Cooley on Torts*, 453-4; *Yates v. Smith*, 11 Bradw. (Ill.) 459.

³ *Robinson v. Shatzley*, 75 Ind. 461; *Robinson v. Skipworth*, 23 Ind. 311; *Oswald v. Hutchinson*, 26 Ill. App. 273.

⁴ *Surles v. Sweeney*, 11 Ore. 21 (4. Pac. 469). See also *Shoemaker v. Simpson*, 16 Kan. 52; *Ballou v. O'Brien*, 20 Mich. 304; *Prime v. Cobb*, 63 Me. 202; *McNeil v. Arnold*, 17 Ark. 155; *Smith v. McLean*, 24 Iowa, 322; *Newell v. Newell*, 34 Miss. 386; *Clark v. Lewis*, 35 Ill. 423; *Farley v. Lincoln*, 51 N. H. 577; *Stanley v. Gaylord*, 1 Cush. 536. A contrary view prevails in New York. *Barrett v. Warren*, 3 Hill, 348; *Tallman v. Tweek*, 26 Barb. 167.

⁵ *Carl v. McGonigal*, 58 Mich. 567 (25 N. W. 516).

§ 466. **To be protected an officer must keep strictly within the command of his writ.** Thus, where a constable seizes B's property for A's debt without B's knowledge, and asserts a claim to it by virtue of his levy inconsistent with B's rights, B may maintain replevin without demand.¹ Where an officer under process against the property of B seizes the property belonging to A, and at the time of the seizure is notified by A that it is his property, and forbidden to take it, *held*, that A can maintain replevin against the officer for the property without any other or further demand.² It is not necessary to make demand of a constable who levies on goods not the debtor's, but in the debtor's possession.³ Where property in the possession of the agent of the owner is levied on by an officer under an execution against a third person, and then turned over by the officer to such agent, to hold as his custodian, it is not necessary for the owner to make a demand before bringing replevin against such officer and custodian, as the original taking by the officer was wrongful.⁴

§ 467. **Demand need not be made on wrongdoer, but must on a bona fide holder. Demand on agent of limited authority insufficient.—Waiver of demand.** No demand need be made upon one who comes wrongfully into possession of personal property, previous to an action by the owner to recover possession thereof. But a demand before action is necessary to be made upon one who purchases or receives such property in good faith from a wrongdoer. The same rule applies to *bona fide* purchasers at public sales under process. A demand made upon an agent simply entrusted with property for safe keeping is insufficient. But where a de-

¹ Dickson v. Randal, 19 Kan. 212; Buck v. Colbath, 3 Wall. (U.S.) 334; Gimble v. Ackley, 12 Iowa, 27; Chinn v. Russell, 2 Blackf. (Ind.) 172; Ledley v. Hays, 1 Col. 160; Tuttle v. Robinson, 78 Ill. 332.

² Stone v. Bird, 16 Kan. 488.

³ Bancroft v. Blizzard, 13 Ohio, 30; Vose v. Stickney, 8 Minn. 75; Doumiel v. Gorham, 6 Cal. 43; Taylor v. Seymour, 6 Cal. 512; Killey v. Scannell, 12 Cal. 73; Bond v. Ward, 7 Mass. 123; Shumway v. Rutter, 8 Pick. 443.

⁴ Tuttle v. Robinson, 78 Ill. 332; Clark v. Lewis, 35 Ill. 417.

defendant in his answer sets up a claim of ownership and right of possession in himself, and demands a return of the property and proceeds to trial on this issue, he thereby waives the objection that no demand was made. Such affirmative claim of ownership is sufficient evidence that demand is not relied upon, and would have been unavailing.¹ Proof of any circumstances that would satisfy a jury that a demand, if made, would not have been complied with, has been held sufficient to excuse this proof.² So if a bailee set up ownership of the property in himself, this is equivalent to a conversion, and no demand is necessary.³ The plaintiff offered to prove that the defendants gave a general order to all their hands not to deliver the horse in dispute to him, or any one for him. *Held*, proper to go to the jury as tending to prove a conversion by defendants.⁴ Where parties stipulated that the goods should be sold and the proceeds paid over to the party who was entitled to them, this obviated the necessity for proof of a demand.⁵ Where the defendant by his pleading admits a demand, proof of one is unnecessary.⁶ Where the property is in the hands of a *bona fide* purchaser from a wrongful taker, demand is necessary before replevin will lie by the rightful owner.⁷

¹ Kellogg v. Olson, 34 Minn. 103 (24 N. W. 364); Mount v. Derick, 5 Hill, 455; Pringle v. Phillips, 5 Sandf. 157; Pierce v. Van Dyke, 6 Hill, 613; 1 Wait. Pr. 718; Talmadge v. Scudder, 38 Pa. St. 517; Gillet v. Roberts, 57 N. Y. 28; Johnson v. Howe, 2 Gilman, 342; Smith v. McLean, 24 Iowa, 322; Shoemaker v. Simpson, 16 Kan. 43; Touere v. Reynolds, 35 Minn. 476 (29 N. W. 171); Ellengbor v. Brackken, 36 Minn. 156 (30 N. W. R. 659).

² Johnson v. Howe, 2 Gilm. 344; Cranz v. Kroger, 22 Ill. 74; Appleton v. Barrett, 29 Wis. 221; Lutz v. Yount, Phill. (N. C. L.) 367; La Place v. Aupoix, 1 Johns. Ca. 407.

³ Simpson v. Wrenn, 50 Ill. 224.

⁴ Johnson v. Howe, 2 Gilm. 344.

⁵ Butters v. Haughwout, 42 Ill. 24.

⁶ Jones v. Spears, 47 Cal. 20.

⁷ Connor v. Comstock, 17 Ind. 90; Wood v. Cohen, 6 Ind. 455; Stanchfield v. Palmer, 4 Greene (Iowa), 23; Stratton v. Allen, 7 Minn. 502; Gilchrist v. Moore, 7 Iowa, 9; Newman v. Jones, 47 Me. 520; Millsbaugh v. Mitchell, 8 Barb. (N. Y.) 333.

§ 468. **To recover costs demand must be made—Waiver of demand—A general denial not.** Where a defendant is rightly in possession of property, the plaintiff must demand possession thereof before bringing replevin; otherwise, the defendant will not be liable for costs, and a mere denial by the defendant in his answer of the facts stated in the petition is not an assertion of ownership of the property, and does not waive a demand where such demand is necessary before bringing suit.¹

§ 469. **Possession of goods by mistake—Lien.** Where goods are delivered by mistake to one who has no right to the possession of them, and he, instead of endeavoring to correct the mistake, lends himself to favor it, and performs without authority services respecting them, and claims thereby a lien, he may be regarded as a wrongdoer from the beginning, and replevin will lie without demand.²

§ 470. **A taker of stray animals** who does not fully comply with the law has no lien, and no demand is necessary.³ But where the taker up complies with the law fully, he acquires a lien for damage and charges, and a demand and tender is necessary before replevin can be maintained by the owner.* Where one takes possession of property as an act of charity or kindness, or for the purpose of preserving it from damage, there is no conversion, and a demand is necessary.⁵

§ 471. **Necessary from a borrower—Lost goods.** Demand is necessary before bringing replevin for an article which defendant has borrowed from one who did not know whose it was and did not claim ownership, but who found it on his premises, where it had been put for safety long before by another stranger to the title, who found it exposed near

¹ *Peters v. Parsons*, 18 Neb. 191 (24 N. W. 687).

² *Purvis v. Moltz*, 2 Abb. Pr. (N. Y.) N. S. 409; *Id.* 32 How. Pr. 478.

³ *Cummings v. Gaun*, 52 Pa. St. 484.

⁴ *Holcomb v. Davis*, 56 Ill. 416.

⁵ *Kennett v. Robinson*, 2 J. J. Marsh (Ky.), 84.

by.¹ A borrower or bailee for hire cannot set up a title in himself adverse to the owner. He must first return the property according to the contract under which he acquired the possession.² A finder of lost property is entitled to a demand, but has no lien for services gratuitously expended upon it, but may have for any reward offered for its recapture. Salvage is an exception to this general rule.³

§ 472. **Possession acquired in good faith, demand necessary.** In replevin against one who has acquired the property in good faith, it is necessary to prove a demand before suit brought, or something equivalent to it.⁴ Where one purchases personal property in good faith from one not the owner, a demand must precede a suit against him in replevin, but it is otherwise if he had notice of the facts.⁵

§ 473. **But a contrary rule has been laid down.** Where property is found in the possession of a third person, who has purchased it, and believes he has good title, the owner may maintain replevin for it without demand.⁶

§ 474. **Conversion—Refusal to deliver in advance of demand.** Where property originally came rightfully into defendant's possession, a demand is usually necessary, but proof of any circumstances showing that a demand would have been unavailing, as the refusal by defendant to listen to one, or a statement in advance that he will not deliver, or proof that he has converted the property will excuse demand, and where the answer alleges that defendant would not have delivered the property if demand had been made, it waives all proof of demand.⁷ So, too, where defendant testified that

¹ Becker v. Vandercook, 54 Mich. 114 (19 N. W. 771).

² Simpson v. Wrenn, 50 Ill. 224; Loeschman v. Machin, 2 Starkie, 310.

³ Etter v. Edwards, 4 Watts (Pa.), 66; Hartford v. Jones, 1 Lord Raymond, 393; Nicholas v. Chapman, 2 H. Bla. 254; Cummings v. Gaun, 52 Pa. St. 484; Binsted v. Buck, 2 W. Blacks. 1117.

⁴ Roach v. Binder, 1 Colo. 322; Ingalls v. Bulkley, 13 Ill. 315; Clark v. Lewis, 35 Ill. 423.

⁵ Kuhns v. Gates, 92 Ind. 66.

⁶ McNeill v. Arnold, 17 Ark. 154.

⁷ Wood v. McDonald, 66 Cal. 546 (6 Pac. 452); Bristol v. Burt, 7 Johns. 257; Gilmore v. Newton, 9 Allen, 171.

he would not have surrendered the property if demand had been made, unless his counsel had ordered him to, *held*, that this was evidence of a conversion which would make a demand unnecessary.¹ If the defendant have the goods at another place and offer to go with the plaintiff and deliver them, it is sufficient. A refusal to deliver at the place of demand is not a refusal that will support replevin where demand and refusal are necessary.² The true ground of a refusal to deliver must be stated. If the authority of the one making the demand is questioned, he should state his authority so that defendant can act advisedly.³ Asking time to take counsel is not a refusal to comply with demand.⁴ A forcible seizure is not necessary to constitute a wrongful taking or a conversion.⁵ But any unlawful or unauthorized intermeddling with or exercise of authority over the property of another is an act of trespass, and, if accompanied by taking and detention, will amount to a conversion.⁶

§ 475. **Must state true reason for not complying with demand.** Defendant cannot give one reason to the person making the demand, and defend on another reason;⁷ cannot pretend that he had the property and induce plaintiff to sue

¹ Dugan v. Nichols, 125 Mass. 576.

² O'Connell v. Jacobs, 115 Mass. 21.

³ Jacoby v. Loussatt, 6 S. & R. 305; Green v. Dunn, 4 Camb. 215; Solomon v. Dawes, 1 Esp. 83; Watt v. Potter, 2 Mason C.C. 77; Ingalls v. Bulkley, 13 Ill. 316; St. John v. O'Connell, 7 Porter (Ala.), 466; Zachary v. Pace, 4 Eng. (Ark.) 212; Connah v. Hale, 23 Wend. 463; Solomon v. Dawes, 1 Esp. 83.

⁴ Page v. Crosby, 24 Pick. 216.

⁵ Lee v. Gould, 47 Pa. St. 398; Haythorn v. Rushforth, 4 Har. 160; Kerley v. Hume, 3 T. B. Mon. (Ky.) 181; Marchman v. Todd, 15 Ga. 25; Skinner v. Stouse, 4 Mo. 93.

⁶ Rolston v. Black, 15 Iowa, 48; Squires v. Smith, 10 B. Mon. (Ky.) 33; Ely v. Ehle, 3 Comst. 506; Hardy v. Clendenning, 25 Ark. 436; Gibbs v. Chase, 10 Mass. 125; Robinson v. Mansfield, 13 Pick. 139; Phillips v. Hall, 8 Wend. 610; Allen v. Crary, 10 Wend. 349; Fonda v. Van Horne, 15 Wend. 631; Neff v. Thompson, 8 Barb. 213; Miller v. Baker, 1 Met. 27; Wilson v. Barker, 4 B. & Adolph. 614.

⁷ Holbrook v. Wight, 24 Wend. 169; Isaac v. Clark, 2 Bulst. 312; Jacoby v. Loussatt, 6 S. & R. (Pa.) 304.

him, and then defend on the ground that he did not have them.¹ Where W. and R. hired cows, and W. took them to his farm, some miles from R.'s, and at the end of the time the owner demanded them from R., who said he would have nothing to do with the cows, *held*, it was for the jury to determine whether, by the reply, he intended to withdraw from a dispute about the property or to collude with W. to hinder the owner from recovering his property, which latter would be equivalent to a positive refusal.²

§ 476. **When demand should be made—When action commenced.** The gist of the action of replevin is the wrongful detention, and this relates to the time of the commencement of the action. Where demand and refusal are necessary to make the detention by the defendant wrongful, such demand and refusal must be prior to the commencement of the action, and evidence of a subsequent demand is properly rejected.³ The issuance of a writ of replevin to the sheriff is the commencement of the suit, and a demand, if necessary, must be made before that time.⁴ Under a statute which requires the affidavit to be made after the cause of action has accrued, in a case where demand is necessary, a demand made by the officer after the issuing of the writ, and while he has it in his possession ready for service, is not good.⁵ The demand must be made upon the defendant while the property is in his possession. His ability to comply with the demand is necessary to give the demand force and effect.⁶

¹ Hall v. White, 3 Cor. & P. 136.

² Mitchell v. Williams, 4 Hill, 16.

³ Brown v. Holmes, 13 Kan. 482; Chenyworth v. Daily, 7 Porter (Ind.), 284; Storms v. Livingston, 6 John. 44; Powers v. Bassford, 19 How. Pr. 309; Purves v. Moltz, 5 Robt. (N. Y.) 653.

⁴ Underwood v. Tatham, 1 Ind. 276; Alden v. Carver, 13 Iowa, 254; Darling v. Tegler, 30 Mich. 54; Boughton v. Bruce, 20 Wend. 234; Cummings v. Vorce, 3 Hill (N. Y.), 285; Badger v. Phinney, 15 Mass. 364.

⁵ Darling v. Tegler, 30 Mich. 54.

⁶ Whitney v. Slouson, 30 Barb. 276; Bowman v. Eaton, 24 Barb. 528; Hawkins v. Hoffman, 6 Hill, 586; Harris v. Hillman, 26 Ala. 380; McArthur v. Corrie, 32 Ala. 87; Whitewell v. Wells, 24 Pick. 29.

But it would seem, if defendant had parted with the goods fraudulently or in anticipation of the demand, the rule would be otherwise.¹

§ 477. **Demand after affidavit signed—Defective, how cured.** Where a demand was made after the affidavit in replevin was signed, but before the writ was served, if demand was necessary the proceedings are defective and a general appearance by defendant does not waive the defect, but it may be cured by plaintiff's filing a new affidavit dated since the demand.²

§ 478. **Demand after issuance of writ.** Where a writ of replevin was sued out and given to the officer to be served only if defendant refused to give up the property on demand of the plaintiff, it was *held* that the suit was not prematurely commenced, and that this was a sufficient demand.³

§ 479. **Proof of, when made—Failure to prove.** Where demand is prerequisite to the bringing of an action, the court may, in its discretion, allow plaintiff to prove demand after the evidence is in and out of time.⁴ The plaintiff should not lose his property simply because he failed to prove that he made a demand before suit commenced.⁵ A demand and refusal made shortly after the writ issues is ordinarily good evidence of a conversion before the writ issued, and that a demand then would not have been complied with.⁶ But where defendant recovers on the ground of want of proof of demand alone, he ought not to be awarded a return, unless he was clearly entitled to the possession of the property.

§ 480. **Where defendant's right limited by time—Property purchased on installment plan.** Where personal property was leased to defendant by plaintiff to January 1st, and on the preceding 31st of December plaintiff made demand

¹ Fennér v. Kirkman, 26 Ala. 653; Andrews v. Shattuck, 32 Barb. 397.

² McAdam v. Walbran, 8 N. Y. (Civ. Proc. R.) 451.

³ O'Neil v. Bailey, 68 Me. 429; Gremer v. Briggs, 110 Mass. 446.

⁴ Crawford v. Furlong, 21 Kan. 698.

⁵ Jessop v. Miller, 1 Keys (N. Y.), 321; Morris v. Pugh, 3 Burr, 1241.

⁶ Badger v. Phinney, 15 Mass. 364.

for a return, and on the 1st of January brought replevin without further demand, *held* that, defendant having acquired possession rightfully, demand was necessary, and that the demand must be made after plaintiff had a right to return under the contract, and that he must fail in this action for want of a proper demand.¹ Where A bought a sewing machine, and was to pay for it by installments, and, after paying the first, refused to pay the others, claiming it was not the machine she had bought, *held*, the company must make demand and offer to refund the money paid before replevin could be maintained.²

§ 481. **On whom made**—A demand of one not having authority to deliver or refuse and having no control over the chattel is insufficient.³ It should usually be made personally upon one in possession and who has power to comply. Demand on wife or servant is not sufficient demand on husband or master.⁴ Demand at the house of a bailee in his absence is not good unless knowledge of the demand is brought home to him before the action commenced.⁵ But where the evidence goes to show that defendant absented himself to avoid demand, it might be sufficient.⁶ When there are two or more defendants acting severally, demand should be on both. When acting jointly or as partners, demand on one is sufficient.⁷ Where there was no evidence that B., the husband, was keeping out of the way to avoid demand, demand of the wife and her refusal to surrender, alleging that the sewing machine was the property of B., was not a demand of B. upon which replevin could be based.⁸ Where goods are entrusted to a

¹ *White v. Brown*, 5 Lous. (N. Y.) 78.

² *Hamilton v. Singer Sewing Machine Company*, 54 Ill. 370.

³ *Barns v. Gardner*, 60 Mich. 133 (26 N. W. 858).

⁴ *Storm v. Livingston*, 6 John. 44; *Mount v. Derick*, 5 Hill, 456; *Pothonier v. Dawson*, Holt, N. P. 383.

⁵ *White v. Demory*, 2 N. H. 546.

⁶ *Goldsmith v. Bryant*, 26 Wis. 39.

⁷ *Nisbet v. Patton*, 4 Rawle, 119; *Newman v. Bennett*, 23 Ill. 427; *Mitchell v. Williams*, 4 Hill, 13; *Holbrook v. Wight*, 24 Wend. 169.

⁸ *Wheeler & Wilson Manufacturing Company v. Tertzlaff*, 53 Wis. 211 (10 N. W. 155).

servant, and he refuses to deliver them to a servant, because he had no authority to do so, this is no evidence of a conversion in action of replevin against the servant. And if the master approve of this refusal afterward, on the ground that the servant had no authority, it is no evidence of a conversion by the master.¹

§ 482. **If proved, failure to allege is cured, after trial.** Where property comes rightfully into the possession of the defendant, to maintain replevin for the wrongful detention thereof, a demand and refusal must be alleged and proved; but if demand and refusal be proved, it is too late on appeal to insist that they were not alleged in the complaint.²

§ 483. **Written demand must be specific—No particular form necessary.** Where plaintiff in replevin makes a written demand on an officer for the property covered by a certain mortgage referred to in the notice, and under which he claims, but, in listing the articles, he omits from the notice one, it is not a good demand as to that one article, and he will be defeated as to that article.³ No particular form is necessary. Defendant must be given to understand the possession of some specific chattel is wanted.⁴ A demand for B.'s stock, if not objected to as not specific enough, is sufficient.⁵ "I have come to demand my property; here is a 'list of it' is good."⁶

§ 484. **Of person in charge sufficient.—Decedent.** Demand made of a person in charge of the effects of an intestate, under an order of court, by the owner of the property, which was lawfully in the intestate's possession at his death, is sufficient to sustain replevin against both him and the ad-

¹ Mount v. Derick, 5 Hill, 456; Mires v. Solebay, 2 Mod. 242; Alexander v. Southey, 5 B. & Ald. 247; Storm v. Livingston, 6 John. 44.

² Treat v. Hathorn, 3 Hun. (N. Y.) 646.

³ Woodward v. Ham, 140 Mass. 154 (2 N. E. 702).

⁴ La Place v. Aupoix, 1 John. Ca. 47; Thompson v. Shirley, 1 Esp. N. P. 31; Smith v. Young, 1 Comp. 440; Colegrove v. Dias, Santos, 2 B. & C. 76.

⁵ Newman v. Bennett, 23 Ill. 428.

⁶ Logan v. Houlditch, 1 Esp. N. P. C. 22.

ministrator impleaded with him.¹ Where demand is necessary, it is sufficient if made of the agent in possession of the property.²

§ 485. **Acts and notice equivalent to demand—Intervenor.** Where plaintiff and defendant had had trouble, and each notified the other to keep off his premises, and plaintiff's horses escaped on to defendant's premises, and plaintiff sent his agent to defendant, who asked if the horses were there and received an evasive answer, and no permission to look or to go on to the premises and get them if there, *held*, a sufficient demand to maintain replevin.³ Where A undertakes in a lawful manner to remove chattels, as his own, from the possession of B, and the latter objects to his doing so, denying that A has any property there, this is equivalent to a formal demand and refusal.⁴ A written notice of the intervenor's ownership, served upon the deputy who levied upon the property, is sufficient demand to entitle the intervenor to recover, the plaintiff having abandoned the suit.⁵ Where articles of personal property belonging to plaintiff, but in defendant's possession, are numerous and scattered in different places, and defendant peremptorily refuses to surrender any part thereof, it is not necessary, in order to make a sufficient demand before suit, that plaintiff should endeavor to compel defendant to go with him to where the articles are, or hear a list of them read.⁶

§ 486. **Of the indices of ownership sufficient.** A demand of the bills of lading of cotton is equivalent to a demand of the cotton itself, and is sufficient to support replevin for the cotton, though the possession of the defendant did not originate in tort.⁷

¹ *Lills & C. Co. v. Russell*, 22 Wis. 178.

² *Dexter v. Sellers*, 102 Ind. 458.

³ *Kiefer v. Carrier*, 53 Wis. 404 (10 N. W. 562).

⁴ *Merriam v. Lynch*, 53 Wis. 82 (10 N. W. 1).

⁵ *Burrows v. Waddell*, 52 Iowa, 195 (3 N. W. 37).

⁶ *Appleton v. Barrett*, 29 Wis. 221.

⁷ *Zachrisson v. Ahman*, 2 Sandf. (N. Y.) 68.

§ 487. **A demand made in violation of the injunction of a court cannot be made the foundation of a right.**¹

§ 488. **A mortgagee of chattels cannot replevy them from an officer who has attached them as the property of the mortgagor, without first making demand, although the mortgage provides that upon the property being attached he may take immediate possession.**²

§ 489. **Mortgagee must make demand of one in possession—Absconded mortgagor.** One holding a mortgage of a span of horses remaining in use on the farm of the mortgagor's wife where they both reside together, and where the horses were when mortgaged, cannot, upon default of the mortgagor, bring replevin against the wife alone without first making a demand of her.³

§ 490. **An action against a sheriff who holds property under execution cannot be maintained by the mortgagee without a written notice served on the officer of his claim of the property.**⁴

§ 491. **Action by mortgagee v. mortgagor.** Replevin rests upon a tortious taking or detention, and cannot be brought until after demand made where the property is in the hands of the mortgagor. A demand of payment before the debt is due is not a demand for the goods, and will not support replevin.⁵

§ 492. **Trustee after default need not demand.** Where

¹ Smith v. Smith, 52 Mich. 538 (18 N. W. 347).

² Hunt v. Williams, 106 Mass. 114; Wing v. Bishop, 9 Gray, 223. The Statute of Massachusetts requires a written demand to be made by a claimant before he can replevy from an attaching officer. Gen. Stat., Ch. 123, § 62-3.

³ Campbell v. Quackenbush, 33 Mich. 287. In this case the mortgagor had absconded, but the team remained on the place, and the wife had done nothing to claim the team.

⁴ Finch v. Hollinger, 43 Iowa, 598; Kaster v. Pease, 42 Iowa, 488. § 3055 of the Iowa Code provides that the officer must levy on property pointed out, unless written notice be served on him that it is claimed by some one other than the defendant in execution.

⁵ Cadwell v. Pray, 41 Mich. 307.

by the terms of a deed of trust on personal property the trustee is authorized to take possession on default of payment, he may after default bring replevin without demand. Where the deed is so drawn that a demand is necessary, it need not be made if the grantor has delivered the property to a third person. Neither the grantor nor his grantee, in such a case, is entitled to have demand made upon him for the property before replevin.¹ A mortgagee of chattels may maintain replevin for them after they are taken by trustee process against the mortgagor without making demand.²

§ 493. **A mortgagor to replevy back must demand.** The plaintiff gave a chattel mortgage to defendant, who took possession. *Held*, that replevin would not lie without demand or in the absence of any provision for the payment of the claim secured.³

§ 494. **Where property taken under an illegal mortgage, demand not necessary by true owner.** Where defendant took possession of a cow claimed to be the property of plaintiff under a chattel mortgage given by her husband, and the jury found specially such ownership, *held*, that no demand was necessary before replevying the animal.⁴

§ 495. **Also, where plaintiff repudiates a delivery made under a void agreement.** Where notes are delivered as collateral upon an usurious agreement, and the party depositing them desires to repudiate the agreement, he must demand the notes before he can replevy them.⁵

§ 496. **Must be made of a purchaser at an execution sale or an officer.** Demand must be made before replevin can be brought by the owner against an officer or a purchaser at an execution sale on the ground that the property was exempt when it was not claimed on that ground, but upon other

¹ *Morris v. Rucks*, 62 Miss. 76.

² *Putnam v. Cushing*, 10 Gray (Mass.), 334.

³ *Brown v. Coon*, 59 Mich. 596 (26 N. W. 780).

⁴ *Denton v. Smith*, 61 Mich. 431 (28 N. W. 160).

⁵ *Boughton v. Bruce*, 20 Wend. (N. Y.) 234.

grounds before the sale.¹ A mere purchaser at a sheriff's sale is not a trespasser, and is entitled to demand even though the officer's seizure and sale was wrongful.² But where the purchaser is the plaintiff in the execution, the law does not look upon him as a *bona fide* purchaser, and the want of demand alone will not defeat the true owner.³ A detention of property purchased at judicial sale is not wrongful even against the true owner, until after demand has been made.⁴

§ 497. **When demand of an officer proceeding under a writ of attachment or other process is necessary—Execution.** Where an officer is proceeding according to law under a valid writ of attachment, a demand must be made of him for the property seized under the writ before one claiming to be the owner can maintain replevin.⁵ But where the officer levies an execution upon the property of one not named in the writ, a demand is not necessary by the owner before bringing replevin.⁶ Where an officer levies upon one person's property to pay the debt of another person, no demand is necessary by the true owner before bringing replevin.⁷ When the original taking was wrongful, and the officer taking was not in the proper discharge of his duty, no demand is necessary.⁸ In action of replevin brought against the sheriff to recover property illegally seized on execution, no demand is necessary.⁹ Demand is not necessary before bring-

¹ *Twinam v. Swart*, 4 Lans. (N. Y.) 263; *Storm v. Livingston*, 6 Johns. (N. Y.) 44; *Barrett v. Warren*, 3 Hill (N. Y.), 351; *Millsbaugh v. Mitchell*, 8 Barb. 335; *Pierce v. Van Dyke*, 6 Hill, 614; *Fuller v. Lewis*, 13 How. Pr. 220.

² *Talmadge v. Scudder*, 38 Pa. St. 518.

³ *Sargent v. Sturm*, 23 Cal. 360.

⁴ *Arthur v. Wallace*, 8 Kan. 267.

⁵ *Hines v. Chambers*, 29 Minn. 7 (11 N. W. 129).

⁶ *Leonard v. Maginnis*, 34 Minn. 506 (26 N. W. 733).

⁷ *Sharon v. Nunan*, 63 Cal. 234; *Boulware v. Craddock*, 30 Cal. 190; *Wellman v. English*, 38 Cal. 583; *Hexter v. Schneider*, 14 Ore. 184 (12 Pac. 668).

⁸ *King v. Orser*, 4 Duer. (N. Y.) 431.

⁹ *Ledley v. Hays*, 1 Col. 160.

ing replevin against an officer whose seizure of goods is an abuse of his authority.¹

§ 498. **Where the property of a stranger to the writ is sold.** No demand is necessary of one who purchased at a sale of property attached as the property of one other than the owner, if the purchaser claim to own it by virtue of the said purchase.² Where plaintiff's horse, in the possession of a third party, has been sold on an execution against such third party, plaintiff can maintain replevin against the purchaser, or the proprietor of a stable in whose charge it was placed, without demand.³

§ 499. **But where property is found by the officer in the actual custody of the person named in his execution,** the levy thereon gives the officer lawful possession, and a demand is an essential prerequisite to suit in replevin against the officer; but when the property is found in the custody of a stranger to the writ, the officer's possession under his levy is wrongful, and no demand is necessary.⁴

§ 500. **In replevin brought by a judgment debtor to recover exempt property seized by an officer under an execution where no similar property is owned by the debtor, and no selection or separation necessary to distinguish the exempt from the non-exempt property, no notice to the officer at the time of the levy that it is claimed as exempt, and no demand for a return prior to suit against the officer, is necessary.**⁵ Where an officer with an attachment levies upon a horse which is exempt, and which is the only horse owned by the debtor, the taking is unlawful, and no demand before suit is necessary.⁶ Demand alleged by petition and admitted by answer need not be proved.⁷

¹ Vanderhorst v. Bacon, 38 Mich. 669.

² Edmunds v. Hill, 133 Mass. 445. See also Blanchard v. Child, 7 Gray, 155; Gilmore v. Newton, 9 Allen, 171.

³ Hicks v. Britt, 21 Ark. 422.

⁴ Stone v. O'Brien, 7 Col. 458 (4 Pac. 792).

⁵ Seip v. Tilghman, 23 Kan. 289.

⁶ Murphy v. Sherman, 25 Minn. 196.

⁷ Jones v. Spears, 47 Cal. 20.

§ 501. **But purchaser when entitled to demand.** The purchaser of property exempt from execution, at an execution sale, is not liable in an action for its recovery, brought without demand by the owner, who, being present, failed to claim the exemption.¹

§ 502. **Conditional sale—Part payment.** Where a sewing machine was sold and delivered to the purchaser, a part of the price being paid in hand, and the balance to be paid in installments, the vendor cannot maintain replevin for the machine, upon the refusal of the purchaser to make further payment on the ground the machine was not such as he had contracted for, without refunding the money already paid, and a demand for the machine and refusal by defendant are necessary prerequisites to commencing the action in such a case.² Where an executory contract for the sale of chattels provides that the purchase price shall be paid in installments, and that title shall not pass until the price is fully paid, and the vendor permits the vendee to retain possession and make other payments after the whole contract price is due, he may not seize the property and terminate the contract for non-payment until he has demanded payment.³ A delivered to B a sewing machine under a contract of sale by which title was not to pass to B until full payment in installments was made. On default in any payment, A had the option to take the machine away. *Held*, that on default of a payment A could not replevy the machine without demand and notice to B of his option, and B's refusal to surrender it.⁴

§ 503. **Fraud by vendee—Attaching or other creditor—No demand necessary.** Where the vendor seeks to rescind a sale of goods for fraud, no demand is necessary before bringing replevin, even if the goods have been attached by

¹ *Twinam v. Swart*, 4 Lans. (N. Y.) 263.

² *Hamilton v. Singer Manufacturing Company*, 54 Ill. 370.

³ *O'Rourke v. Hadcock*, 114 N. Y. 541 (22 N. E. 33).

⁴ *Wheeler & Wilson Manufacturing Company v. Teetztaff*, 53 Wis. 211 (10 N. W. 155).

a creditor of the vendee; an attaching creditor parts with no consideration and acquires no greater right to the property than the vendee had.¹ If the vendee of goods sold on a condition procures them to be sold, on an execution against him, to one who has knowledge of the condition, the original vendor may maintain replevin against the second purchaser without demand.² Obtaining goods by fraudulent pretenses is a tortious taking, and replevin will lie for them without a demand.³ Where one claimed to have a warrant and pretended to make an arrest under it, and took certain property in settlement, *held*, that replevin would lie without demand.⁴ Where the original possession is obtained by fraud and under circumstances which did not transfer the title from the owner, demand is not necessary against a purchaser, as he cannot claim title and resist plaintiff's title for the want of demand at the same time. But if possession was originally acquired under circumstances which make it necessary for the original owner to rescind the bargain or give notice, demand is necessary against a purchaser.⁵ Where goods which have been obtained by means of a fraudulent purchase are seized under a warrant of insolvency, as the property of the buyer, the seller may maintain replevin therefor without a previous demand.⁶

§ 504. **Vendee must make demand of third party in possession.** Proof of demand by the vendee and refusal

¹ *Oswego v. Lendrum*, 57 Iowa, 573 (10 N. W. 900). Many authorities are cited by the court as to what fraud will avoid a sale. *Buffington v. Gerrish*, 15 Mass. 158; *Bussing v. Rice*, 2 Cush. 48; *Acker v. Campbell*, 23 Wend. 372. But see *Hoffman v. Noble*, 6 Met. (Mass.) 75; *Trudo v. Anderson*, 10 Mich. 357; *Prime v. Cobb*, 63 Me. 202; *Farwell v. Hanchett*, 120 Ill. 573 (9 N. E. 58).

² *Blanchard v. Child*, 7 Gray (Mass.), 155.

³ *Ayers v. Hewett*, 20 Me. 281; *Bussing v. Rice*, 2 Cush. 48; *Acker v. Campbell*, 23 Wend. 372.

⁴ *Foshay v. Ferguson*, 5 Hill, 158.

⁵ *Sargent v. Sturm*, 23 Cal. 360; *Priam v. Barden*, 5 Ark. 81; *McNeill v. Arnold*, 17 Ark. 173; *Trapnall v. Hattier*, 6 Ark. 18; *O'Neill v. Henderson*, 15 Ark. 235.

⁶ *Trudo v. Anderson*, 10 Mich. 357.

to deliver is necessary to entitle the purchaser of a chattel, which at the time of the purchase was in the possession of a third party, to recover against such third party for its wrongful detention.¹

§ 505. **Where demand necessary to put vendor in the wrong.** Where the vendee places lumber upon the premises of the vendor, and they disagree in regard to the inspection of the lumber, the vendee cannot maintain replevin for the lumber until he has asked and been refused permission to remove it. The property having been put voluntarily upon the vendee's premises by the vendor, the vendee cannot be made a wrongdoer by simply letting it remain there.²

§ 506. **If vendee's possession lawful, demand must be made.** When personal chattels are sold, to remain the vendor's until paid for, and time is given for payment, which is extended on the understanding that the vendee may acquire a full title by subsequently completing payment, the vendee's possession of the property is lawful, and the vendor cannot reclaim it nor maintain replevin without first having made demand for it.³

§ 507. **But if he violate the contract of sale, not necessary.** The transfer of property to another city, and there pawning it for money borrowed by the vendee, is a direct violation of his duty as bailee, which makes him a wrongdoer; and the vendor may bring replevin against such person without making a previous demand, as his possession originated in a tortious taking.⁴

§ 508. **Purchaser must demand and tender bid.** To entitle a party who has bargained for the purchase of personal property, but has paid no part of the purchase money, and there is no time or place fixed for the delivery, to main-

¹ Howell v. Kroose, 4 E. D. Smith (N. Y.), 357.

² Darling v. Tegler, 30 Mich. 54.

³ Kimball v. Farnum, 61 N. H. 348.

⁴ Whitney v. McConnell, 29 Mich. 13.

tain replevin for the possession of the property, a tender of the purchase price and a demand for the property must be made before commencement of the suit.¹

§ 509. **Same at sheriff's sale.** A purchaser of goods at a sheriff's sale may maintain replevin for the property so bought after demand.²

§ 510. **Sufficient demand—Claim of ownership by defendant, a waiver.** Where A, the vendor, states to C that he is the owner, and that the property was not to be removed from the specified place, and C replies that he has bought it from B, that he should keep it and would not give it up, *held*, that this was sufficient demand to maintain replevin.³

§ 511. **Where a person known to be an agent exceeds his authority,** in delivering wheat to a carrier, it is not necessary for the real owner to make demand or tender the carrier his charges before bringing replevin.⁴

§ 512. **Not necessary where bailee wrongfully sells property or converts it.** A was the bailee of plaintiff's horse and wrongfully sold him to B, and B sold him to the defendant. *Held*, that the plaintiff could maintain replevin without demand.⁵ When a bailee denies the title of the owner and sets up title in himself, no demand is necessary, and if defendant answer title in himself he is precluded from objecting the want of demand.⁶ Or where a bailee of a horse drove it beyond the point for which he had hired it, *held*, a conversion and no demand necessary.⁷ Where the owner of machinery demanded it of defendant in whose possession he had placed it, and defendant refused to let it go until he got other in its place, *held*, a sufficient demand.⁸ Where one's

¹ Hart v. Livingston, 29 Iowa, 217.

² Hazzard v. Burton, 4 Harr. (Del.) 2.

³ Hall v. Draper, 20 Kan. 137.

⁴ Hayes v. Campbell, 63 Cal. 143.

⁵ Galvin v. Bacon, 11 Me. (2 Fairf.) 28.

⁶ Felton v. Hales, 67 N. C. 107.

⁷ Jacoby v. Loussatt, 6 S. & R. 300.

⁸ Haythorn v. Rushforth, 4 Har. (19 N. J.) 160.

property has been disposed of, by the one having it in charge without authority, the owner may bring replevin for it without a previous demand.¹ A entrusted his horse to B for sale. B gave the horse to his servant who exchanged it. A was allowed to maintain replevin against the holder of the horse without demand.²

§ 513. **The manner of defendant's possession does not affect the necessity of demand.** That the defendant in an action of replevin obtained possession of the goods in controversy by virtue of a writ of replevin against a third person, in whose possession they were, does not affect the plaintiff's right to maintain the action without a demand, if he is the owner of the goods and entitled to the immediate possession of them.³

§ 514. **Tender when necessary to discharge lien before suit brought against common carrier.** The law is well settled that where a party obtains the possession of property lawfully, an action of replevin cannot be maintained to recover it until a demand has been made and the possession refused. So where goods are shipped by rail, the railway company, having obtained possession lawfully, will have the right to hold them until the freight actually due is paid or tendered, and a demand is made. If too much freight is charged, the owner should tender the proper amount before bringing replevin. The tender is too late after the suit is commenced.⁴ And the tender should be followed up by bringing the money into court.⁵ A consignee of goods sent C. O. D. cannot maintain replevin against the carrier before payment or tender of the proper charges.⁶ An owner of

¹ Ballou v. O'Brien, 20 Mich. 304; Trudo v. Anderson, 10 Mich. 357.

² Trudo v. Anderson, 10 Mich. 357.

³ Kelleher v. Clark, 135 Mass. 45.

⁴ O. & M. Ry. Co. v. Noe, 77 Ill. 513; Ingalls v. Bulkley, 13 Ill. 315; Clark v. Lewis, 35 Ill. 417.

⁵ E. & C. R. R. Co. v. Marsh, 57 Ind. 505.

⁶ Lane v. Chadwick, 146 Mass. 68 (15 N. E. 121). In this case defendant was an express agent, who refused to deliver the goods or allow them to be examined until charges were paid, and plaintiff claimed the right to examine them first.

goods transported by an express company may, after tender of legal charges for transportation, etc., and after demand and refusal, maintain replevin for the goods.¹ A shipper may maintain replevin for a cargo where the master wrongfully refuses to proceed on the voyage.² But where goods are delivered into the hands of defendants as carriers, replevin will not lie against them for the mere detention of the goods.³

§ 515. **The same—What issues triable—Offset.** The right of a carrier to retain property until its charges for carriage are discharged, rests upon the performance of the contract of carriage upon its part. If it has negligently delayed the delivery of the property at its destination, or otherwise subjected itself to liability for damages to the consignee in respect to the property carried, that would disentitle it to the extent of such liability to demand and recover freight, and if the damage should exceed the amount of the freight to which it would otherwise be entitled, of course it would not be entitled to demand and recover anything for the carriage of the property. And in such cases the owner or consignee may maintain replevin without a tender, and the claim for freight by defendant, and the claim for damage by the plaintiff, at least to the extent of the freight charge, may be adjudicated in the replevin suit.⁴

§ 516. **Excessive charges—Tender of proper amount.** One who brings replevin and seeks to break a lien on the ground that the charges were excessive must show that he tendered what he claimed was a reasonable charge. A lienholder cannot be said to refuse to state the amount he claims when he merely refuses to vary from schedule rates which both parties know and understand.⁵ Where the service was

¹ *Eveleth v. Blossom*, 54 Me. 447.

² *Portland Bank v. Stubbs*, 6 Mass. 422.

³ *Woodward v. Grand Trunk*, 46 N. H. 524.

⁴ *Dyer v. Grand Trunk Railway*, 42 Vt. 441; *Humphreys v. Reed*, 6 Wharton, 435; *Cutting v. Grand Trunk Railway*, 13 Allen, 381; *Boston & M. R. Company v. Brown*, 15 Gray, 223.

⁵ *Hall v. Tittabawassee Boom Company*, 51 Mich. 377 (16 N. W. 770).

performed under such circumstances that no lien was acquired on the freight, a tender made of charges may be withdrawn at any time and is not binding. The tender must have relation to some issue in the case.¹

§ 517. **Of note or property taken in exchange.** If one who exchanges property desire to recover it back, he must tender back what he received, although the exchange may have been an enforced one, produced by violence. The fact that the defendant, upon demand, refused to surrender the property gotten by him, does not excuse a tender back by the plaintiff of what he received.² Where the vendor of goods brings replevin against a fraudulent purchaser, without having rescinded the sale by an offer to return the note given for the price, he must fail; but if, after suit brought and before trial, he offer to return the note, and thereby rescind the sale, the court should not order a return of the property, but should only give judgment against the plaintiff for costs, and such damages, if any, as the defendant may have sustained.³ If the note is forged, it need not be tendered back.⁴

§ 518. **Tender must be unconditional.** The tender made as the foundation of a demand upon which to base a replevin suit must be unconditional.⁵

§ 519. **So must refusal.** D. consigned goods to M., who pledged them to a third party who knew they were owned by D. *Held*, that D. could recover in replevin without tendering repayment of the loan. When a party declines to accept payment or performance, except in a way to which he is not entitled, he cannot insist that the action is prematurely brought.⁶

§ 520. **Tender before action brought.** A tender otherwise sufficient to change a rightful into a wrongful posses-

¹ McCullough v. Hellwig, 66 Md. 269 (7 A. 455).

² Reynolds v. Copeland, 71 Ind. 422.

³ Doom v. Lockwood, 115 Ill. 490 (4 N. E. 500).

⁴ Haase v. Mitchell, 58 Ind. 213.

⁵ Kitchen v. Clark, 1 Mo. App. 430.

⁶ Macky v. Dellinger, 73 Pa. 85.

sion of property must, in order to avail a plaintiff in an action to recover such property, be made before the commencement of the action. A tender made after the filing of the petition and the issue of process, and by the officer who has the process in his possession, is not made before the commencement of the action.¹

§ 521. **Inn-keeper or carrier's lien**—Where defendant has a lien upon property in his possession, it cannot be replevied without payment or tender of the amount of his lien, and it is no excuse that such a tender would have been useless, as defendant would have refused to surrender the goods.² An inn-keeper or a carrier has a lien, and replevin cannot be maintained without tender of the amount of their charges, except where the property has been placed in their possession by one who has stolen it, when they would have no lien against the true owner, and on tender would be necessary by him.³

§ 522. **Landlord's lien**—Mortgagee. Where the statute gives the landlord a lien on the crop for rent, a mortgagee of the tenant cannot replevy the crop without first paying the landlord his rent.⁴ A tender after default, but while the mortgagor is in possession, if kept good by the payment of the money into court, is a good defense to an action by the mortgagee for the property.⁵ A tender of the full amount due destroys the lien of a chattel mortgage, and the mortgagor may thereafter bring trover or replevin for the property against the mortgagee in possession.⁶

¹ *Smith v. Woodleaf*, 21 Kan. 717. This was replevin by the owner for cattle taken up by defendant for trespass, and the officers claiming to act for the owner, when he went to serve the writ of replevin, tendered as damages a greater amount than the jury allowed, which was refused.

² *Fowler v. Parsons*, 143 Mass. 401 (9 N. E. 799).

³ *Robinson v. Baker*, 5 Cush. 187; *Fitch v. Newberry*, 1 Doug. (Mich.) 1.

⁴ *Roth v. Williams*, 45 Ark. 447; *Buck v. Lee*, 36 Ark. 525.

⁵ *Musgat v. Pumpelly*, 46 Wis. 666.

⁶ *Flanders v. Chamberlain*, 24 Mich. 305. See also *Moychan v. Moore*, 9 Mich. 9; *Caruthers v. Humphrey*, 12 Mich. 270; *Van Husen v. Knouse*, 13 Mich. 303. In states like New York and Wisconsin, where a chattel

§ 523. **Where a tradesman has a lien for work done on goods deposited with him for manufacture, replevin cannot be maintained by the owner until his charges for the work done have been first paid or tendered.**¹ Where a boiler maker claimed a lien upon a boiler for work done thereon, and also for a balance on account, and insisted upon holding it until this balance was paid, he could not on the trial set up the particular lien as a defense and win on the ground of no tender. In other words, he must state his reasons for his refusal to deliver truthfully, and will be held to that statement on the trial. Had he placed it on the ground of his specific lien for work done on the boiler, plaintiff could not recover without tender, but as he claimed to hold it for a debt for which he had no lien, no tender was necessary.²

§ 524. **Expenses advanced under a wrongful levy cannot be recovered.** Where a sheriff levied on A's growing wheat for B's debt, and, without A's consent, harvested, threshed, and marketed it, *held*, that A could bring replevin without demand or tender of amount so expended, and that A could not be compelled to pay the expenses so incurred by the sheriff.³ So where a constable levied on goods shipped to the debtor before delivery, by the carrier to him, and the seller ordered them shipped back, and brought replevin for them against the constable, *held*, that the constable could not recover the freight he had paid the carrier.⁴

mortgage is treated as a transfer of the legal title, and the effect of default in payment of the money secured thereby is to render the title of the mortgagee absolute, a tender thereafter made does not operate to reinvest the title in the mortgagor, unless accepted, and replevin would not lie.

¹ Mathias v. Sellers, 86 Pa. 486.

² Thatcher v. Harlan, 2 Houst. (Del.) 194; Thompson v. Trail, 6 B. & C. 36; White v. Gainer, 2 Bing. 23; Jacoby v. Loussatt, 6 S. & R. (Pa.) 304; Isaac v. Clark, 2 Bulet, 312.

³ Sims v. Mead, 29 Kan. 124.

⁴ Keep v. Moore, 11 Lea. (Tenn.) 285.

PART SECOND.

**QUESTIONS ARISING IN THE PROSECUTION AND
DEFENSE OF AN ACTION IN REPLEVIN.**



CHAPTER XXII.

THE AFFIDAVIT, COMPLAINT, DECLARATION, AND PETITION.

	Section.		Section.
The affidavit—Its history and what it is	525	Allegations of value are not binding on the trial	540
Importance of the affidavit, complaint, declaration, or petition	526	When value in affidavit governs proper practice	541
An affidavit must be filed in all cases	527	Must allege wrongful detention—Illustrations	542
The defendant alone can take advantage of failure to file affidavit	528	Distinction between “he detains” and “he detained”	543
Jurisdiction depends upon affidavit	529	The law requires a more particular description in replevin than in trespass or trover	544
It must be signed and sworn to	530	A variance in description is fatal	545
Allegations of the affidavit should be in the present tense	531	Copies of written instruments need not be set out	546
Right of possession must be alleged—Illustrations	532	A description which can be made definite is good	547
“Owner” and “ownership” defined	533	Description may be amended to correct mistake	548
Affidavit must allege the property was not taken for tax, etc.	534	What description sufficient—The best possible will do	549
Must allege that it was not taken on execution or attachment	535	Description by kind or quantity	550
Or all facts making the property exempt from seizure must be alleged	536	Undivided interest—Fractional part as a description	551
This allegation need not be in the exact words of the statute	537	Where articles are numerous, a general description	552
Must state that it was not taken on a writ of replevin	538	Sufficiency of—Defects waived by pleading	553
The affidavit should state the value of the property	539	When sufficiency is a question of fact, and when of law	554
		Nature of plaintiff’s interest need not be particularly alleged	555
		Special interest must be pleaded	556

278 AFFIDAVIT, COMPLAINT, DECLARATION, AND PETITION.

Section.	Section
Allegations in the alternative not fatal 557	Cannot strike out part of the property by amendment on appeal 576
But they must be definite as to the person entitled to possession 558	May amend by adding new article 577
Plaintiff cannot take inconsistent positions 559	Jurisdictional defects cannot be thus cured 578
The affidavit may be made by an agent or attorney . . . 560	Cannot amend by making new parties 579
Agency, how stated . . . 561	Total lack of affidavit cannot be cured by amendment . . 580
How made when corporation is the complaining party . 562	Statutory form of affidavit is but a general guide . . . 581
There is a distinction between a good cause of action defectively stated and a defective cause of action . . . 563	Need not follow particular form 582
Venue should be laid in the county 564	Requisites of affidavit . . . 583
Plaintiff may replevy property held by different titles in one action 565	Approved form of affidavit . 584
Redundant or irrelevant matter may be stricken out . 566	Another form of action should not be joined with replevin . 585
The statutory allegations of the affidavit are not conclusive of the facts stated . 567	The affidavit need not be separate from the complaint . 586
Fatal defects in affidavit—Illustrations 568	Affidavit takes the place of all other pleadings by plaintiff 587
An affidavit in replevin may be amended 569	A complaint may be used as an affidavit 588
Damages claimed may be enlarged by amendment . . 570	Complaint—Affidavit . . . 589
The proper way to amend is by a new affidavit . . . 571	Sufficiency of complaint . . 590
Signature and jurat may be added <i>nunc pro tunc</i> by amendment 572	What constitutes a good complaint—Illustrations . . 591
Amendments sworn to by different agent of plaintiff from original affidavit may be filed as a matter of right . 573	By sheriff, in case of attached property 592
Effect of failure to amend substantial defect 574	What the declaration or complaint should contain . . 593
Cannot thus add a new cause of action 575	Declaration 594
	Declaration must follow affidavit 595
	Must make issuable allegations 596
	Artificial words not to govern 597
	When both affidavit and petition are used, petition need not be as specific as the affidavit 598
	Where both are used, the affi-

	Section,		Section.
davit is not a part of the		Petition should be construed	
pleadings	599	as a whole	602
Petition—Illustrations	600	Special damages must be specially pleaded	603
Plaintiff must stand or fall by title alleged in his petition	601		

§ 525. **The affidavit, its history and what it is.** At common law a writ of replevin was issued out of the court of chancery and could be sued out only at Westminster. Afterwards, by the statute of Marlbridge, 52 Henry III., Ch. 21, the sheriff of each county, “upon plaint to him made,” was authorized to replevy the goods. 3 Blacks. Com. 147. The affidavit now takes the place of this common law plaint, or, rather, it is the plaint, the word affidavit as used in replevin having the same meaning as the word plaint in the statute of Marlbridge.¹ The affidavit required by the statute, therefore, is the complaint of the common law.² In replevin, where the object of the action is to obtain a delivery of the goods which it is claimed are wrongfully detained by the defendant, the filing of an affidavit setting forth substantially the facts required by the statute is a condition precedent to the issuing of the order of delivery, and without it the order would be a nullity if issued.³ The affidavit is, under most of the codes, the foundation of the action of replevin, and is jurisdictional. But under the reformed mode of procedure the courts have been quite liberal in allowing it to be amended. Where the statute required that plaintiff swear that the property had not been taken *in execution on any order or judgment against the plaintiff*, and the affidavit alleged that the property was taken by execution issued on a void judgment

¹ *Bardwell v. Stubbett*, 17 Neb. 487 (23 N. W. 344).

² *Anderson v. Hapler*, 34 Ill. 439.

³ *Bardwell v. Stubbett*, 17 Neb. 485 (23 N. W. 344); *Wilbur v. Flood*, 16 Mich. 40; *Phenix v. Clark*, 2 Mich. 327; *Perkins v. Smith*, 4 Blackf. 302; *Milliken v. Selye*, 6 Hill, 623; *Bridges v. Layman*, 31 Ind. 385; *Payne v. Bruton*, 5 Eng. (Ark.) 57; *Cutler v. Rathbone*, 1 Hill, 204; *Kehoe v. Rounds*, 69 Ill. 352; *McClaghray v. Cratzenberg*, 39 Ill. 123; *Stacy v. Farnham*, 2 How. Pr. 26; *Berrien v. Westervelt*, 12 Wend. 194.

against him, *held*, that the affidavit was defective, that plaintiff could not question the validity of the judgment in this way, but that he should have been allowed to amend his affidavit on application.¹ In an action for the recovery of personal property, the affidavit is the foundation of the jurisdiction. If it be regular, subsequent mistakes are not fatal.² The affidavit is essential, and must show a wrongful detention.³ The affidavit and bond in replevin are in New York essential to the sheriff's right to serve the writ.⁴ The jurisdiction in replevin is not derived from the complaint, but the affidavit and giving of the bond.⁵

§ 526. **Importance of the affidavit—Complaint—Declaration or petition.** As we have seen, the affidavit is the basis of the action, and is jurisdictional. In some states it is called complaint. In some the petition takes the form of an affidavit and the first pleading is a petition, but it is in such cases an affidavit in fact, though called something else. In some states the affidavit is all that need be filed by plaintiff; in others, the same pleadings are required as in any action, and the affidavit is additional. In these states it is not a part of the record, but is treated the same as an affidavit in an attachment case, with the exception that the jurisdiction depends upon it. Where the affidavit is the only paper filed, it must state the title of the case and other facts usually stated in the petition. But with all these statutory differences, the affidavit or the pleading which takes its place, though called by another name, must state all the facts which go to confer jurisdiction on the court. While in the lower courts, the affidavit is frequently the only pleading filed by plaintiff in the courts of record. The prevailing practice seems to be to file an affidavit setting up the statutory grounds alone, and with it, or at a subsequent time, also a petition, declara-

¹ *Wilson v. Macklin*, 7 Neb. 50.

² *Carlton v. Dixon*, 12 Ore. 144 (6 Pac. 500).

³ *Wilbur v. Flood*, 16 Mich. 40.

⁴ *Milliken v. Selye*, 6 Hill (N. Y.), 623.

⁵ *Hecklin v. Ess*, 16 Minn. 38; *St. Martin v. Desnoyer*, 1 Minn. 25.

tion, or other pleading more fully setting up the cause of action, but omitting the purely formal matters alleged in the affidavit, as that the property was not taken for a tax, etc. There seems to be no necessity for this double pleading in most cases, as the affidavit might easily be made to contain all it is necessary for the pleader to allege.

§ 527. **An affidavit must be filed** in all cases, the only exception being where the property is not taken, and the case proceeds under a statutory provision as an action for damages. If there has been a petition filed, it is *held*, in such cases, that no affidavit is necessary, as it is really not a replevin action if the property is not taken.¹ Where the property is not taken or delivered to plaintiff, the want of an affidavit is not fatal, as the action may proceed *in case*.² In a case in justice court where a bill of particulars was filed, as well as an affidavit in replevin, and all the papers were regular except the affidavit, which was very defective, *held*, that the proceeding was not void, and, as the property was not taken, the court could go on and hear the case as one for damages.³ In Missouri the affidavit is only to anticipate the delivery of the property to plaintiff. If no delivery is had, an affidavit is not necessary, and the suit may proceed without one, and the *status* of the property will remain the same until final judgment.⁴ A plaintiff may omit the negative averments from his petition, and proceed without taking out the writ of replevin.⁵

§ 528. **The defendant alone can take advantage of failure to file affidavit.** The affidavit in replevin is for the

¹ Baker v. Dubois, 32 Mich. 92.

² Stone v. Hopkins, 11 Heis. (Tenn.) 190; Catterlin v. Mitchell, 27 Ind. 298; Hadson v. Warner, 60 Ind. 214.

³ Williams v. Gardner, 22 Kan. 122.

⁴ Bingham v. Morrow, 29 Mo. App. 448; Eads v. Stephens, 63 Mo. 90.

⁵ Batchelor v. Walburn, 23 Kan. 733. The Kansas Code, § 176, says: "The plaintiff in an action to recover the possession of specific personal property *may*, at the commencement of the suit, or at any time before answer, claim the immediate delivery of such property, as provided in this chapter." The order of replevin is *held* to be ancillary to the action, and at plaintiff's option.

benefit of the defendant, and failure of plaintiff to comply with the law in this respect does not render the proceeding void, but only voidable at defendant's election. The plaintiff can take no advantage of it.¹ The first step in the proceeding is the affidavit, and, as it is the foundation upon which the suit is built up, it must be good and true, or plaintiff will be cast in his suit. Without the affidavit, the writ is a nullity if issued.²

§ 529. **Jurisdiction depends upon affidavit.** In replevin before a justice of the peace, as in forcible entry and detainer, there must be an affidavit sworn to or affirmed, containing all the statutory requirements, to give the justice jurisdiction to issue the writ, and this must affirmatively appear, as nothing can be presumed in favor of his jurisdiction.³

§ 530. **Must be signed and sworn to.** Complaint must be verified to give the court jurisdiction.⁴ A petition must be sworn to before a writ can legally issue.⁵ In order to sustain a judgment by default, the affidavit in replevin must have been sworn to.⁶ There are cases, however, which hold that affidavits actually sworn to and so certified are good without being signed.⁷ Must be in writing and signed by plaintiff or his agent.⁸ Must be sworn to before an officer qualified to administer oaths.⁹ The office of an affidavit in replevin

¹ *Nichols v. Standish*, 48 Conn. 321.

² *Wilbur v. Flood*, 16 Mich. 40; *Milliken v. Selye*, 6 Hill, 623; *Bridge v. Layman*, 31 Ind. 385; *Cutler v. Rathbone*, 1 Hill, 204; *Payne v. Bruton*, 5 Eng. (Ark.) 57; *Perkins v. Smith*, 4 Blackf. 302; *Kehoe v. Rounds*, 69 Ill. 352; *Phenix v. Clark*, 2 Mich. 327; *Lacy v. Farnham*, 2 How. Pr. 26; *McClaghry v. Cratzenberg*, 39 Ill. 123.

³ *Evans v. Bouton*, 85 Ill. 579; *Stolberg v. Olmmacht*, 50 Ill. 442; *Center v. Gebney*, 71 Ill. 557.

⁴ *Dowell v. Richardson*, 10 Ind. 573.

⁵ *Cure v. Wilson*, 25 Iowa, 205.

⁶ *Kehoe v. Rounds*, 69 Ill. 351.

⁷ *Crist v. Parks*, 19 Tex. 234; *Shelton v. Berry*, 19 Tex. 154; *Haff v. Spicer*, 3 N. Y. Term (Ca. Ca.) 190; *Jackson v. Virgil*, 3 Johns. 540. See *Hoover v. Rhoads*, 6 Iowa, 506; 3 Blk. Com. 304.

⁸ *Eddy v. Beal*, 34 Ind. 161.

⁹ *Berrien v. Westervelt*, 12 Wend. 194.

is to confer jurisdiction, and it is not fatally defective because not signed by plaintiff. It is sufficient if it appear from the body of the affidavit and from the jurat that the affidavit was made by the plaintiff.¹

§ 531. **Allegations of the affidavit should be in the present tense.** In an action of claim and delivery, the plaintiff's ownership and right to possession are properly alleged in the present tense.² Plaintiff must plead a right to the property in himself at the time the action commenced.³ The entire investigation in replevin has reference to the *status* of the property at the commencement of the action. A complaint in replevin alleging a cause of action existing more than four years prior to the commencement thereof and not at that time is bad.⁴

§ 532. **Right of possession must be alleged—Illustrations.** When the plaintiff sues to recover the possession of a specific share and certain quantity of wheat, of which he alleges that he is the owner and entitled to the possession, and that defendant has possession thereof without right, and unlawfully detains the same from the plaintiff, the complaint is sufficient to withstand a demurrer thereto for the want of facts. The joint ownership of the wheat by the plaintiff and defendant, if it exists, is not apparent upon the face of the complaint, and is matter of defense to be shown by answer.⁵ The plaintiff, in order to maintain replevin, must allege interest in himself, right of immediate possession, and detention on the part of defendant. A general denial on part of defendant puts in issue all these allegations and throws upon plaintiff the burden of proving them.⁶ An affidavit in justice court "that plaintiff is the owner and entitled to the posses-

¹ *Bloomington v. Chittenden* (Mich.), 42 N. W. 836.

² *Tancre v. Reynolds*, 35 Minn. 47 (29 N. W. 171, as *Tancre v. Pullman*).

³ *Loomis v. Youle*, 1 Minn. 175.

⁴ *Afflerback v. McGovern* (Cal.), 21, p. 837.

⁵ *Ingel v. Scott*, 86 Ind. 518; *Schenck v. Long*, 67 Ind. 579.

⁶ *Wilson v. Fuller*, 9 Kan. 176.

sion" is sufficient without an averment that he was *lawfully* entitled to it.¹ An affidavit containing no averment of possession in the plaintiff, or that the property was taken from him unlawfully and without his consent, is bad.² Where the complaint alleged that the plaintiffs were possessed of the goods, described "as of their own proper goods," it was said to be sufficient.³ An allegation that the plaintiff on a certain day owned and possessed certain property, and that the defendant on that day took and wrongfully detained it, is sufficient.⁴ A complaint in replevin is sufficient if it allege generally plaintiff's ownership without stating particulars of his title, or that it had been levied on, but was exempt.⁵

§ 533. **Owner and ownership defined.** The term owner, as used in the replevin statutes, does not mean absolute and unqualified title, but means a right to possession. Any interest coupled with a right of immediate possession constitutes ownership under these statutes.⁶ It must allege ownership of the goods and chattels. It is not sufficient to say they were taken out of plaintiff's possession,⁷ or to simply allege that plaintiff is entitled to possession.⁸ Ownership without right to immediate possession is of no avail.⁹ But proof of absolute ownership is not necessary to support such an alle-

¹ *Stoker v. Crane*, 46 Mo. 264.

² *McArthur v. Hagan*, Hempst. 286.

³ *Stickney v. Smith*, 5 Minn. 486. See *Hunter v. Hudson River, &c.*, 20 Barb. 493; *Marshall v. Davis*, 1 Wend. 109; *Prosser v. Woodward*, 21 Wend. 206.

⁴ *Adams v. Corriston*, 7 Minn. 456; *Hurd v. Simonton*, 10 Minn. 423.

⁵ *Carlson v. Small*, 32 Minn. 492 (21 N. W. 737).

⁶ *Johnson v. Carnley*, 6 Seld. (N. Y.) 578; *Rogers v. Arnold*, 12 Wend. 35; *Williams v. West*, 2 Ohio St. 83; *Sprague v. Clark*, 41 Vt. 6.

⁷ *Bond v. Mitchell*, 3 Barb. 304; *Vandenburgh v. Van Valkenburgh*, 8 Barb. 217; *Prosser v. Woodward*, 21 Wend. 205; *Johnson v. Neale*, 6 Allen (Mass.), 227; *Robinson v. Calloway*, 4 Ark. 101; *Fontleroy v. Aylmer*, 1 Lord Raymond, 239.

⁸ *Pattison v. Adams*, 7 Hill (N. Y.), 126; *Webb v. Fox*, 7 Durnf. & East, 392; *Bond v. Mitchell*, 3 Barb. 304.

⁹ *Williams v. West*, 2 Ohio St. 83.

gation.¹ The allegation of ownership does not mean by absolute title; proof of an interest or right to possession is sufficient.²

§ 534. **Affidavit must allege the property was not taken for tax, etc.** In replevin the affidavit should state that the property had not been distrained for taxes assessed.³ The contrary has been held.⁴ It is not necessary to prove such averments unless the pleadings raise an issue on them.⁵ A provision common to all the states is that the affidavit must allege that the property was not taken for any tax, fine, or assessment, and this requirement must be complied with very strictly.⁶ Thus, where it was averred that the property had not been seized for a *legal* tax, it was held that the case should be dismissed on motion.⁷ So where it was alleged that it was not taken *in execution* for any tax, etc., the court held it insufficient, as it might have been seized for a tax on other process than execution.⁸

§ 535. **Must allege that it was not taken on execution or attachment against plaintiff.** A complaint in replevin which does not allege that the property has not been taken by virtue of any execution or other writ against the plaintiff, or, if it has been so taken, that the same is exempt from execution, is bad on demurrer.⁹ A complaint which alleges the ownership and right of possession in plaintiff, the unlawful

¹ Johnson v. Carnley, 6 Seld. (N. Y.) 570; Sprague v. Clark, 41 Vt. 6; Cleaves v. Herbert, 61 Ill. 127; Adams v. Corrison, 7 Minn. 456; Hurd v. Simonton, 10 Minn. 423; Loomis v. Youle, 1 Minn. 175.

² Wilson v. Royston, 2 Ark. 315; Prater v. Frazier, 11 Ark. 249; Johnson v. Carnley, 6 Selden (N. Y.), 570; Sprague v. Clark, 41 Vt. 6; Moorman v. Quick, 20 Ind. 68; Shoneo v. Caldwell, 21 Ala. 448.

³ Phenix v. Clark, 2 Mich. 327; Campbell v. Head, 13 Ill. 122.

⁴ Brueghurst v. Pollard, 6 Ind. 452.

⁵ Carney v. Doyle, 14 Wis. 270.

⁶ Mt. Carbon v. Andrews, 53 Ill. 182; Phenix v. Clark, 2 Mich. 327.

⁷ McClaughry v. Cratzenberg, 39 Ill. 123.

⁸ Phenix v. Clark, 2 Mich. 327.

⁹ McCoy v. Beck, 50 Ind. 283. See Reynolds v. Copeland, 71 Ind. 422; Dowell v. Richardson, 10 Ind. 573; Bridges v. Layman, 81 Ind. 385.

detention by defendant, and that the property has not been taken on execution, etc., is good.¹ But if it fails to allege these facts, it is bad on demurrer.²

§ 536. **Or all facts making the property exempt from seizure must be alleged.** In replevin for property levied upon on the ground that the property is exempt, the plaintiff must allege all the facts that make the property exempt and entitle him to maintain replevin therefor.³ To maintain replevin for property attached upon the ground that it is exempt, plaintiff must allege and show affirmatively all the facts required by statute, entitling him to hold the property as exempt.⁴ "To show" means more than to simply allege. The facts must be set up.⁵ Where plaintiff's possession by virtue of a special property, the affidavit must show the facts constituting such special property. If they rest in a writing, it should be set out.⁶ This requirement of the statute is imperative. Thus, where a supervisor brought replevin for the books and papers of his office, which were not subject to and could not be seized for a tax, the court held that he must state in his affidavit that they were not taken for a tax.⁷

§ 537. **This allegation need not be in the exact words of the statute.** It is not necessary that an allegation that the property was not taken upon execution, etc., be in the exact words of the statute if in substance it is sufficient and covers all the ground required by the statute.⁸ But a declaration in the form of the statute has been held good.⁹

§ 538. **Must state that it was not taken on a writ of**

¹ Deacon v. Powers, 57 Ind. 489.

² Entsminger v. Jackson, 73 Ind. 144.

³ Newcomer v. Alexander, 96 Ind. 453; Chinn v. Russell, 2 Blackf. 172; Hartlep v. Cole, 101 Ind. 458; The L. E. & St. L. Ry. v. Payne, 103 Ind. 183 (2 N. E. 582).

⁴ O'Donnell v. Segar, 25 Mich. 367.

⁵ Spalding v. Spalding, 3 How. Pr. (N. Y.) 297.

⁶ Depew v. Leal, 2 Abb. Pr. (N. Y.) 131.

⁷ Phenix v. Clark, 2 Mich. 327.

⁸ Auld v. Kimberlin, 7 Kan. 601.

⁹ Elliott v. Whitmore, 5 Mich. 532.

replevin against plaintiff or any order of delivery issued in replevin. The object of this provision is to prevent cross or double replevins.¹ (See chapter XXXIX.) The law will not permit property once taken in replevin to be again seized in replevin, to try the same questions involved in the first action.² But where a new title has accrued to the plaintiff since the first seizure, it has been permitted, but is an exception to the rule.³

§ 539. **The affidavit should state the value of the property.** This statement of value is not only a guide in identifying the property, but where the statute does not provide for an appraisement, is a guide in fixing the amount of bond to be given. It also determines the jurisdiction of the court in cases where that is limited by the amount involved; but if not stated, the clerk issuing the writ has no authority to fix it.⁴ The value of property as stated in the affidavit for a writ of replevin is presumed to be its true value until otherwise shown in subsequent proceedings.⁵

§ 540. **Allegation of value not binding on trial.** An allegation in the declaration in replevin of the value of the property is a matter of form in the pleading, and not an admission by the plaintiff in an inquiry by the jury as to its value.⁶ The statement of value is but a form of pleading; even if not denied is not admitted, and plaintiff must prove the value, and may prove a greater value than that alleged,

¹ Auld v. Kimberlin, 7 Kan. 601; Westenberger v. Wheaton, 8 Kan. 169.

² Wilson v. Macklin, 7 Neb. 51.

³ Williams v. West, 2 Ohio St. 89.

⁴ Watkins v. Page, 2 Wis. 92; Caldwell v. West, 1 Zab. (N. J.) 411; People v. Core, 85 Ill. 248; Deardorff v. Ulmer, 34 Ind. 353; Schaffer v. Faldwesch, 16 Mo. 339; Kimball v. True, 34 Me. 88; Roach v. Moulton, 1 Chand. (Wis.) 187; Murdock v. Will, 1 Dall. 341; Pomeroy v. Trimper, 8 Allen, 398; Darling v. Conklin, 42 Wis. 478.

⁵ Carew v. Matthews, 41 Mich. 576; Henderson v. Desborough, 28 Mich. 170.

⁶ Bailey v. Ellis, 21 Ark. 488; Hawkins v. Johnson, 3 Blackf. (Ind.) 46.

if he can.¹ The objection that the complaint does not state the value is cured after verdict of damages for its detention.²

§ 541. **When value in affidavit governs—Proper practice.** Where the value is not found by the justice, on appeal, the value stated in the affidavit must govern for the purpose of fixing the bond.³ The better practice is to state the value of each separate article claimed.⁴ But this has been *held* to not be absolutely necessary.⁵ The affidavit must allege the value of the property. If it do not, and if objected to by defendant and overruled by the court, verdict will not cure the defect.⁶ But failure to allege value is cured by verdict assessing the value of the articles replevied, or by a verdict assessing the value of the detention thereof to the plaintiff.⁷

§ 542. **Must allege wrongful detention—Illustrations.** A complaint which alleges that the defendant unlawfully and wrongfully took from the plaintiffs and converted to their own use the property shows with sufficient certainty, at least, after verdict, that the property was taken without leave and had not been returned.⁸ It is only necessary in the affidavit to charge the wrongful detention, and this is the rule in regard to the petition, as well as the affidavit, and the petition in replevin may be amended as in any other case.⁹ Unlawful detention, as well as an illegal caption, will support the writ.¹⁰ The plaintiff must allege that the defendant wrongfully took the property.¹¹ This requirement is imperative.¹²

¹ C. & S. W. R. R. v. N. W. Packet Co., 38 Iowa, 377.

² Bales v. Scott, 26 Ind. 202.

³ Bradley v. Morse, 21 Wis. 680.

⁴ Knox v. Noble, 25 Kan. 449.

⁵ Root v. Woodruff, 6 Hill (N. Y.), 418.

⁶ Barruel v. Irwin, 2 N. M. 223.

⁷ Bales v. Scott, 26 Ind. 202.

Roberts v. Porter, 78 Ind. 130.

⁹ Hale v. Wigton, 20 Neb. 90 (29 N. W. 177); Oleson v. Merrill, 20 Wis. 487.

¹⁰ Douglas v. Gardner, 63 Me. 462.

¹¹ Coit v. Waples, 1 Minn. 134; Wilhite v. Williams (Kan.), 21 P. 256.

¹² Paul v. Luttrell, 1 Col. 318; Childs v. Hart, 7 Barb. 370; Wilson v.

In an action to recover personal property wrongfully detained, the complaint must allege a general or special ownership in the plaintiff;¹ otherwise, the complaint will be bad on demurrer.² A complaint alleging that on a certain day the plaintiff owned and possessed certain property, that on or about the same day the defendant took it away, and detains it against sureties and pledges to the damage, etc., is good.³ A complaint which alleges merely that the property is the property of plaintiff, that the defendant has become possessed of and wrongfully detains it, is sufficient.⁴ Under an averment of wrongful detention plaintiff may prove a demand and refusal. The affidavit alleged that defendant had the property in his possession, "unlawfully from the possession" of the plaintiff. *Held*, that the omission of the word "detained," after "unlawfully," was not a fatal defect.⁵ The allegation of wrongful detention is essential, and evidence to sustain it is equally as essential.⁶ If goods were restored before the action was commenced, it will not lie.⁷ An allegation that defendant was about to take possession is not sufficient.⁸ A "wrongful taking" should always be alleged if the facts warrant it.⁹

§ 543. **Distinction between "he detains" and "he detained."** The allegation "he detains" implies that the

Fuller, 9 Kan. 177; Leroy v. McConnell, 8 Kan. 273; Brown v. Holmes, 13 Kan. 482; Draper v. Ellis, 12 Iowa, 316; Hurd v. Simonton, 10 Minn. 423; Adams v. Corriston, 7 Minn. 456.

¹ Schofield v. Whitelegge, 12 Abb. Pr. (N.Y.) 320; Gardner v. Scovill, 1 How. Pr. (N.S.) 272.

² Baker v. Cardwell, 6 Col. 199; Wilson v. Fuller, 9 Kan. 177; Tandle v. Crane, 13 Kan. 344; Beckwith v. Phillis, 15 Wis. 223; Bliss, Code Plead. § 212; Hilliard on Rem. 20-77; Maxwell's P. & P. 232-424.

³ Adams v. Corriston, 7 Minn. 456.

⁴ Oleson v. Merrill, 20 Wis. 462.

⁵ Smith v. Dodge, 37 Mich. 354.

⁶ Brown v. Holmes, 13 Kan. 482.

⁷ Paul v. Luttrell, 1 Col. 317.

⁸ Herron v. Hughes, 25 Cal. 555.

⁹ Reynolds v. Lounsbury, 6 Hill, 534.

goods are still detained by defendant, and under such an allegation damages down to the time of trial may be recovered. But if the allegation be "he detained," it implies that they were taken on the writ, and damage can only be recovered prior to the return of the writ.¹ Proof of wrongful taking is not admissible under an allegation of wrongful detention except as an excuse for proving demand.²

§ 544. The law requires a more particular description in replevin than in trespass or trover, but where the action is brought by one in his representative capacity for property never in his possession, a less particular description is required than in other cases.³ The following descriptions: "Divers goods and chattels;"⁴ "A quantity of corn, about two hundred bushels;"⁵ "A lot of goods in the store of A;"⁶ "Forty ounces of mace, nutmeg, and cloves;"⁷ "Fourteen skimmers and ladles and three pots"⁸—are good in trover where the only object is to notify the defendant upon what the cause of action is founded, but in replevin, where the object is to enable the officer to seize certain property, would be insufficient unless aided by something outside of the pleading itself.⁹ For that reason, great care should be taken to fully identify and designate the property in replevin.¹⁰ "One lot

¹ Fox v. Prickett, 5 Vroom (N. J.), 13; Petre v. Duke, Lutw. 360; Potter v. North, 1 Wm. Saurd. 347*b*, n. 2.

² Eldred v. The Oconto Company, 33 Wis. 141; Newell v. Newell, 34 Miss. 385; Coit v. Waples, 1 Minn. 134.

³ David v. David, Administrator, 66 Ala. 139; Kenaston v. Moore Cro. Car. 89; Hartford v. Jones, 2 Salk. 654; Gordon v. Hostetter, 37 N. Y. 103; Taylor v. Wells, 1 Mod. 46; Farwell v. Fox, 18 Mich. 169; Snedeker v. Quick (6 Halst.), 11 N. J. 179; Pope v. Tillman, 7 Taunt. 642; Davis v. Easley, 13 Ill. 192.

⁴ Pope v. Tillman, 7 Taunt. 642; Warner v. Aughenbaugh, 15 S. & R. (Pa.) 9.

⁵ Stevens v. Osman, 1 Mich. 92.

⁶ Edgerly v. Emerson, 3 Foster (23 N. H.), 555.

⁷ Hartford v. Jones, 2 Salk. 651.

⁸ Bern v. Mattaire Co., Temp. H. 119.

⁹ Ruck v. Morris, 28 Pa. St. 245.

¹⁰ Stevens v. Osman, 1 Mich. 92; Wilson v. Gray, 8 Watts (Pa.), 39;

"of seed cotton, about 6,000 pounds, twelve stacks of fodder, "one load of corn, about fifteen bushels, of the total value of "\$250," is insufficient, and is not aided (where objected to) by verdict and judgment with the same description.¹

§ 545. **A variance is fatal.** Where a plaint in replevin describes the property in suit as two bay horses, and the proof shows that one of them was a sorrel, the variance is fatal.²

§ 546. **Copies of written instruments need not be set out,** if they can be described so as to be identified without. Thus in replevin for a promissory note a copy need not be set out.³

§ 547. **A description which can be made definite is good.** Although the description is indefinite, if the property can be pointed out, it is sufficient;⁴ it need not be so definite that the sheriff can find the property without aid.⁵ The object of a "specific description" is to enable the officer to execute his writ.⁶ "One white shoat" has been held a sufficient description;⁷ so also, "A box of skins and furs marked 'J. Windors, Logansport, Indiana'";⁸ so also, "One promissory note for one hundred dollars, executed by James Sawyers to Agnes White";⁹ "Six oxen";¹⁰ "Heifer" has been

Welch v. Smith, 45 Cal. 230; Root v. Woodruff, 6 Hill (N. Y.), 418; Snyder v. Vaux, 2 Rawle, 427; Kaufmann v. Schilling, 58 Mo. 219; Gray v. Parker, 38 Mo. 160; Ryder v. Hathaway, 21 Pick. 305; Hart v. Fitzgerald, 2 Mass. 509; Carlton v. Davis, 8 Allen (Mass.), 94; Low v. Martin, 18 Ill. 286; Reese v. Harris, 27 Ala. 306; Farwell v. Fox, 18 Mich. 169; Stanchfield v. Palmer, 4 G. Green (Iowa), 25; Brown v. Sax, 7 Cow. 95.

¹ Lockhart v. Little (S. C.), 9 S. E. 511.

² Taylor v. Riddle, 35 Ill. 567.

³ Bales v. Scott, 26 Ind. 202.

⁴ Warner v. Aughenbach, 15 Serg. & R. 11; Rood v. Woodruff, 6 Hill, 418; Foredice v. Rinehart, 11 Ore. 208 (8 Pac. 285.); Ruch v. Morris, 28 Pa. St. 249; More v. Clipson, Allen, 33; Smith v. McLean, 24 Iowa, 324; Lawrence v. Coates, 7 Ohio St. 194; Buckley v. Buckley, 9 Nev. 379.

⁵ Lea v. Terry, 15 La. (Ann.) 159.

⁶ Smith v. Stanford, 62 Ind. 392.

⁷ Onstatt v. Ream, 30 Ind. 259.

⁸ Minchrod v. Windoes, 29 Ind. 288.

⁹ Highnote v. White, 67 Ind. 596.

¹⁰ Farwell v. Fox, 18 Mich. 169.

held a proper term to be used in describing a cow;¹ "All articles of household furniture now contained in a certain house [describing it], consisting of carpets, chairs," etc., is good;² a description in the complaint of the property sought to be recovered as "Sixty-eight head of hogs on the macadamized road in said county, on the place formerly kept by Wong Hin Soon," is reasonably certain;³ "Five hundred and seventy-two three-year-old Texas cattle, now in possession of, etc., in Morris County, Kansas," held, sufficient;⁴ "Two carriages and two horses of the value of \$700, and the same unjustly detains," etc., held, sufficient on demurrer;⁵ "All the stock, tools, and chattels belonging to the mortgagor, in and about the wheelwright shop now occupied by him," is sufficient;⁶ "Fifteen hundred pounds of cotton seed" was held sufficient as to substance and quantity, but not as to location.⁷ Where the sheriff levied on coin which was exchanged for bank bills, by consent, this change was held not to prejudice the rights of a third party who brought replevin for the bills.⁸

§ 548. Although description may be amended to correct a mistake and in the furtherance of justice,⁹ as the writ and

¹ Pomeroy v. Trimper, 8 Allen (Mass.), 403.

² Beach v. Derby, 19 Ill. 619.

³ Guille v. Wong Fook, 13 Ore. 577 (11 Pac. 277).

⁴ Brown v. Holmes, 13 Kan. 492.

⁵ Ruch v. Morris, 28 Pa. St. 245.

⁶ Harding v. Coburn, 12 Met. 333; Winslow v. Merchants Insurance Company, 4 Met. 306; Wolfe v. Dorr, 24 Me. 104; Burdett v. Hunt, 25 Me. 419; Morse v. Pike, 15 N. H. 529.

⁷ Hill v. Robinson, 16 Ark. 90.

⁸ St. Louis & A. Railroad v. Castello, 28 Mo. 380. But see Hurd v. West, 7 Cow. 752; Ames v. Mississippi Boom Company, 8 Minn. 470; Snyder v. Vaux, 2 Rawle (Pa.), 423. As to bank bills, see Dows v. Begganall, Lalor's Suplmt. 408; Warner v. Sauk Company Bank, 20 Wis. 492; Jackson v. Anderson, 4 Taunt. 24; Skidmore v. Taylor, 29 Cal. 619. As to coin, see Holiday v. Hicks, Cro. Eliz. 661; Griffith v. Bogardus, 14 Cal. 410; Clark v. Shee, 1 Cowp. R. 200; Sager v. Blain, 44 Hand. (N. Y.) 448; Bull N. P. 32; Draycot v. Piot, Cro. Eliz. 818; Rapalje v. Emory, 2 Dail. 51.

⁹ Perkins v. Smith, 4 Blackf. (Ind.) 302; Applewhite v. Allen, 8 Humph.

bond and all other proceedings are based on the affidavit, great care should be taken to describe the property claimed just as the witnesses will describe it.¹ Application to amend must be made before the motion to quash the writ is sustained, as then the case is only pending for the purpose of assessing damages.²

§ 549. **What description sufficient**—The best possible will do. A description of property in a petition in replevin which would pass the title in a chattel mortgage is sufficient.³ And where the complaint alleges a sufficient reason why a particular description of the property cannot be given, a general description will be sufficient on demurrer.⁴

§ 550. **Description by kind or quantity.** Where the party is definitely located, it has been *held* that the exact number of bushels or pounds need not be stated if this is not necessary to separate it from other property of the same kind, as “a pile of wheat,” “a quantity of barrels of pork.”⁵ The plaintiff must identify the particular property claimed, even if mingled with other property.⁶ Where wheat was described as growing in a certain year and harvested on a cer-

(Tenn.) 698; *Baker v. Dubois*, 32 Mich. 93; *Parks v. Barkham*, 1 Mich. 95; *Campbell v. Head*, 13 Ill. 126; *Wilson v. Macklin*, 7 Neb. 52.

¹ *Taylor v. Riddle*, 35 Ill. 567; *Beregesh v. Keevil*, 19 Mo. 128.

² *Campbell v. Head*, 13 Ill. 126; *Perkins v. Smith*, 4 Blackf. 302; *Smith v. Emerson*, 16 Ind. 355; *Eddy v. Beal*, 34 Ind. 161; *Kirkpatrick v. Cooper*, 77 Ill. 566.

³ *The City of Fort Dodge v. Moore*, 37 Iowa, 388. In this petition the description was as follows: “Three piles of hardwood lumber, lying on Plumb Street, north of Block No. 7, in Carpenter, Morrison & Vincent’s Addition to Fort Dodge, estimated as containing 3,000 feet in the aggregate, more or less, and of the value of \$25 per thousand feet; one pole scraper of the value of \$20; one keg spikes of the value of \$6; one axe of value of \$1,” etc., etc., all of the property being in the possession of the defendant as sheriff.

⁴ *Hoke v. Applegate*, 92 Ind. 570.

⁵ *Scudder v. Worster*, 11 Cush. 573; *Groat v. Gile*, 61 N. Y. 431; *Susquehanna, &c., v. Finney*, 58 Pa. St. 200.

⁶ *Ames v. Mississippi, &c.*, 8 Minn. 467. See *Hotchkiss v. Hunt*, 49 Me. 213; *Mohn v. Stoner*, 14 Iowa, 115.

tain date, on a certain piece of land (described), *held*, that it was not too indefinite.¹

§ 551. **Undivided interest—Fractional part as a description.** Where property sought to be recovered in an action of claim and delivery is a certain undivided fractional part of a certain specified quantity of property, uniform in quality and value, and susceptible of a fair and equal division by count, measurement, or weight (as grain in bulk), the description and proof of the property sought to be recovered, as such undivided fractional part of the specified quantity, is sufficiently specific, and under such a description in his writ the officer may properly seize such part of the whole quantity as is equal to the undivided fractional part claimed.² The description and valuation should be reasonably certain. The description of a mare and colt together is sufficient.³

§ 552. **Where articles are numerous a general description** has been *held* sufficient, as "All other articles of personal property in and about the mortgagor's shop."⁴ "A certain storehouse, warehouse, and the goods therein contained, being the store in Council Bluffs, in said state and county, known and designated as the store of your petitioner," is sufficient for the store and contents.⁵ The description of the goods in a complaint in replevin, as "One stock of dry goods, notions, fancy articles, etc., now in store occupied by the defendant, on Main Street, in the city of Valparaiso, Porter County, Indiana," *held*, sufficient.⁶ A complaint for "One

¹ Hall v. Durham (Ind.), 20 N. E. 282.

² Ellingboe v. Brakken, 36 Minn. 156 (30 N. W. 659). See also Kaufmann v. Schilling, 58 Mo. 218; Sutherland v. Carter, 52 Mich. 471 (17 N. W. 780 and 18 N. W. 223); Read v. Middleton, 62 Iowa, 317 (17 N. W. 532); Stone v. Quall, 36 Minn. 46 (29 N. W. 326).

³ Prescott v. Heilner, 13 Ore. 200 (9 Pac. 403).

⁴ Pilkington v. Trigg, 28 Mo. 98.

⁵ Ellsworth v. Henshall, 4 G. Green (Iowa), 148; Litchman v. Potter, 116 Mass. 373.

⁶ Malone v. Stickney, 88 Ind. 594; citing Minchrod v. Windoes, 29 Ind. 288; Onstatt v. Ream, 30 Ind. 259; Smith v. Stanford, 62 Ind. 392.

"chest or box of tools, containing one complete set of carpenter's tools, embracing all tools used in the carpenter's trade; one complete set of carving tools, embracing all tools used for scroll work or carving; two sets of drawing tools, used for drawing plans of buildings by architects; also, one set of turning tools, used by carpenters in turning lathes," is a sufficient description of the property sued for.¹

§ 553. **Sufficiency of—Defects waived by pleading.** A complaint in replevin will be sufficient if it will inform the defendant of the nature of the plaintiff's cause of action, and be so explicit that a judgment in the suit may be used as a bar to another action for the same cause, and the description will be sufficient if it enable the officer "to take the property described and deliver it forthwith."² An objection to the sufficiency of the description in the complaint comes too late after verdict.³ Uncertainty in the description is waived by pleading over.⁴ Mere uncertainty in the description of the property affords no ground for a motion in arrest of judgment.⁵ To take advantage of defect in description the defendant must object at the first opportunity, and usually, if the right property is taken by the officer, it cures any defect in the description, and objection then comes too late. So consent to the taking of half barrels for barrels of mackerel is a waiver of the right to object for that reason, and "barrels" will be considered as a measure of quantity without regard to vessel in which packed.⁶ So giving bond for retention of the property is a waiver of objections to the description.⁷

¹ *Thompson v. Pearce*, 49 Ala. 210; *Haynes v. Crutchfield*, 7 Ala. 189.

² *Smith v. Stanford*, 62 Ind. 392; *Milholland v. Pence*, 11 Ind. 203; *Clark v. Benefiel*, 18 Ind. 405; *Powell v. DeHart*, 55 Ind. 94; *The United States Express Company v. Kiefer*, 59 Ind. 263; *Hewitt v. Jenkins*, 60 Ind. 110; *Entsminger v. Jackson*, 73 Ind. 144.

³ *Powell v. Stickney*, 88 Ind. 310.

⁴ *Southall v. Garney*, 2 Leigh (Va.), 372; *Hawes v. Robinson*, 44 Ark. 308.

⁵ *James v. Fowler*, 90 Ind. 563.

⁶ *Gardner v. Lane*, 9 Allen (Mass.), 493.

⁷ *Ruch v. Morris*, 28 Pa. St. 245; *Warner v. Aughenbaugh*, 15 S. & R. (Pa.) 9.

An affidavit in replevin must describe the property sued for in such manner as to identify it. But after trial and verdict on the merits it is too late to object to the insufficiency of the affidavit. In justice court the first office of the affidavit is to procure the order of delivery. When that is accomplished it has performed its office as an affidavit, and thereafter serves as a complaint.¹

§ 554. **When sufficiency is a question of fact and when of law.** When the question is one of sufficiency of a given description to pass title at all, it is a question of law for the court. But where the question is as to the identity of the property with that described, or the correctness of the description, it is a question of fact for the jury.²

§ 555. **Nature of plaintiff's interest need not be particularly alleged.** When the affidavit in justice court contains all the averments required by the statute, it is sufficient. The nature of plaintiff's interest need not be stated in the affidavit.³ In replevin for a crop of wheat, cut and taken from the land by defendants, it is sufficient if the complaint allege plaintiff's possession of the land without alleging the particular means or title by which he had possession.⁴ A petition which states facts showing that the plaintiff is the general owner of the property sought to be recovered sufficiently describes his ownership, although it erroneously denominates it as a special property.⁵ In an action to recover specific personal property, it is not necessary to allege the consideration of the assignment by which the plaintiff claims title to the property, although such assignment was made after the conversion and during the retention.⁶ In replevin,

¹ Hawes v. Robinson, 44 Ark. 308; Hannah v. Baily, 30 Ark. 681; Perkins v. Smith, 4 Blackf. (Ind.) 299; Kirkpatrick v. Cooper, 77 Ill. 565; Warner v. Aughenbaugh, 15 S. & R. 9.

² Vennum v. Thompson, 38 Ill. 144.

³ Hass v. Prescott, 38 Wis. 147.

⁴ Conner v. Bludworth, 54 Cal. 635.

⁵ Robinson v. Fitch, 26 Ohio St. 659. See also Hill v. Butler, 6 Ohio St. 216.

⁶ Vogel v. Badcock, 1 Abb. Pr. (N. Y.) 176.

for a steam saw mill and its appurtenances, the affidavit must aver that the property in question is personal estate.¹ Evidence of plaintiff's title should not be pleaded, but the fact stated in an issuable form.²

§ 556. **Special interest must be pleaded.** Where a plaintiff claims possession by virtue of a special property he must allege the facts which give him the right to bring replevin.³ Thus a mortgagee of chattels who brings replevin against another mortgagee, without alleging the conditions of his mortgage or breach thereof, fails to state a cause of action.⁴

§ 557. **Allegations in the alternative not fatal.** In an action to recover exempt property in justice court, an affidavit which states in the statutory language that the property in question was not taken from the plaintiff "by any process legally or properly issued against him, or, if so taken, it was exempt from seizure on such process," is not invalid on account of the retention of the alternative clause, and substantially states that the property was exempt, whether taken under lawful process or not.⁵

§ 558. **But they must be definite as to the person entitled to possession.** But an allegation that "*they were entitled*

¹ Chatterton v. Saul, 16 Ill. 149.

² Fidler v. Delavan, 20 Wend. 57; Bond v. Mitchell, 3 Barb. 304; Alwood v. Ruckman, 21 Ill. 200; Pattison v. Adams, 7 Hill (N. Y.), 126; Prosser v. Woodward, 21 Wend. 205; Robinson v. Calloway, 4 Ark. 101; Martin v. Watson, 8 Wis. 315; Johnson v. Neale, 6 Allen (Mass.), 227; Vogle v. Babcock, 1 Abb. Pr. (N. Y.) 176. See on general subject, Ely v. Ehle, 3 Comst. 507; Dunham v. Wykoff, 3 Wend. 280; Stickney v. Smith, 5 Minn. 486; Marshall v. Davis, 1 Wend. 109; Hunter v. Hudson, etc., 20 Barb. 493; Brockway v. Burnap, 12 Barb. 347; Id. 16 Barb. 309; Hendricks v. Decker, 35 Barb. 298; Wilson v. Royston, 2 Ark. 315; Hatch v. Fowler, 28 Mich. 210; Vandenburg v. Van Valkenburgh, 8 Barb. 217; Ice v. Lockridge, 21 Texas, 461. But a party having no title may replevy against a wrongdoer. Prater v. Frazier, 11 Ark. 249.

³ Curtis v. Cutler, 7 Neb. 315.

⁴ Madison National Bank v. Farmer (Dak.), 40 N. W. 345.

⁵ Carlson v. Small, 32 Minn. 492 (21 N. W. 737). In this respect it differs from an affidavit in attachment. Tessier v. Englehart, 18 Neb. 167 (24 N. W. 734).

to the possession," etc., was held bad.¹ A declaration in replevin by husband and wife should show specially the interest of each in the goods.² In a replevin suit brought jointly by a husband as trustee of his wife, and by the wife in her own right, the affidavit, which was signed by the husband alone, stated that he believed *that he, as trustee of his wife, or his wife in her own right*, was entitled to the immediate possession of the property. *Held*, insufficient, as uncertain and indefinite. The affidavit must show a right of possession in some one person, or a joint right in several.³

§ 559. **Plaintiff cannot take inconsistent positions.** The plaintiff cannot allege in his complaint that defendant is in possession, and on the trial recover judgment against him on the ground that he was not in possession, but had permitted another to take it.⁴

§ 560. **The affidavit may be made by an agent or attorney on behalf of plaintiff in most states, and in some by "another" person on behalf of plaintiff.**⁵ The affidavit was insufficient in that it did not state that the person making it was the agent of plaintiff. *Held*, that the plaintiff should have been allowed to amend it on appeal to the district court.⁶ Where the affidavit is made by an agent, it should be as positive as when made by the plaintiff himself.⁷

§ 561. **Agency—How stated.** While the addition of the

¹ *Pattison v. Adams*, 7 Hill, 126.

² *Gentry v. Borgis*, 6 Blackf. (Ind.) 261.

³ *Spencer v. Bidwell*, 49 Conn. 61. The statute under which this decision was rendered is in substance that no writ shall issue until the plaintiff or some credible person shall subscribe an affidavit that the affiant believes that the plaintiff is entitled to the immediate possession of the goods sought to be replevied, which affidavit shall be attached to the writ. Gen. Statutes, Title 19, Chap. 17, Part 15, Sec. 2.

⁴ *Hawkins v. Roberts*, 45 Cal. 38.

⁵ *Johnson v. Mason*, 16 Mo. App. 271; *Hall v. Durham*, 117 Ind. 429 (20 N. E. 282). See *Powell v. Stickney*, 88 Ind. 310; *Malone v. Stickney*, 88 Ind. 594; *Hall v. Durham* (Ind.), 20 N. E. 282.

⁶ *Martinez v. Martinez*, 2 N. M. 464.

⁷ *Frink v. Flanagan*, 6 Ill. (1 Gilm.) 35. See *Branch v. Branch*, 6 Fla. 315.

agency as a matter of description, thus: "J. L. Jackson, "agent for plaintiff, makes oath and says," is not a fatal error;¹ still, the better form is: "J. L. Jackson, being first, "duly sworn, upon oath says he is agent for plaintiff," etc.² The rule is the same in attachment as in replevin affidavits. An affidavit to a petition, and also to the affidavit in replevin, was signed: "Frank Delone & Co., per P. B. Murphy, agent." *Held*, that it is sufficient, it being apparent that the required oath in both cases was made by said Murphy as agent, although it should have been signed by the agent alone.³

§ 562. **Where a corporation is the complaining party,** the affidavit must negative the consent of the *corporation* (not the officer) to the disappearance of the property, and allege that the *corporation* claims, etc.⁴ And where the proceeding is by a firm the affidavit should allege that the possession violated is the possession of the firm, and not of the affiant, and must be made by one individual. Where an affidavit describes affiant as a member of a firm, but alleges the possession violated as that of affiant, it is a proceeding in favor of affiant as an individual, and not of the firm.⁵ A petition signed "G. W. & R. Hoover" (the plaintiffs) *held* not good, but allowed to be amended to show that it was sworn to by one of plaintiffs.⁶

§ 563. **There is a distinction between a good cause of action defectively stated and a defective cause of action.** The latter defect can be taken advantage of at any time,

¹ *Remington v. Cushen*, 8 Mo. App. 528. See *Tessier v. Crowley*, 16 Neb. 369 (20 N. W. 264).

² *Miller v. Chicago, Minneapolis & St. Paul Railroad* (Wis.), 17 N. W. 130; *Anderson v. Wehe* (Wis.), 17 N. W. 426; *Sloan v. Anderson*, 57 Wis. 135; *Manley v. Headley*, 10 Kan. 88; *Willis v. Lyman*, 22 Tex. 268; *Pool v. Webster*, 3 Metc. (Ky.) 278; *Dean v. Oppenheimer*, 25 Md. 368; *Wiley v. Aultman*, 53 Wis. 560; *Tessier v. Crowley*, 16 Neb. 369 (20 N. W. 264).

³ *Hershiser v. Delane*, 24 Neb. 380.

⁴ *McEvoy v. Hussey*, 64 Ga. 314.

⁵ *McClain v. Cherokee Iron Company*, 58 Ga. 233.

⁶ *Hoover v. Rhoads*, 6 Iowa, 505.

while defects of the former class are waived unless objected to at the proper time. A good cause of action defectively stated will be cured by judgment.¹

§ 564. **Venue should be laid in the county.** An affidavit upon which a possessory warrant issues is sufficiently specific as to the county in which the property is, if it shows of what county the defendant is, and that the property has been received or taken possession of by him.² In replevin for articles not distrained, it is sufficient if the taking be laid in the county.³ Formerly the *close* must be stated for the reason that a distress could only be made upon the land out of which the writ issued.⁴ In some states the town must be stated.⁵ If the allegation is at a house on Gay Street, proof that the taking was on Gay Street, though not at this particular house, *held*, good.⁶ Under the reformed codes of procedure, it is only necessary to lay the venue within the jurisdiction of the court where the action is brought. (See sections 326 to 331.)

§ 565. **Plaintiff may replevy property held by different titles in one action.** A petition in replevin may allege a special property as lessee of part of the property, and absolute ownership of the rest, if it allege that plaintiff is entitled to immediate possession of all.⁷

§ 566. **Redundant or irrelevant matter may be stricken out of a petition in replevin, the same as in any other case.**⁸

¹ Wadley v. Harris, 25 Ark. 36.

² Clayton v. Ganey, 63 Ga. 331.

³ Muck v. Folkroad, 1 Brown (Pa.), 60.

⁴ Gardner v. Humphrey, 10 Johns. 53; Steph. *Nisi Prius*, Vol. 2, p. 1333.

⁵ Muck v. Folkroad, 1 Brown (Pa.), 60; Ely v. Ehle, 3 Comst. (N. Y.) 510; Williams v. Welch, 5 Wend. 290.

⁶ Faget v. Brayton, 2 Har. & J. (Md.) 350.

⁷ Everett v. Buchanan, 2 Dak. 249; Gaynor v. Blewitt, 69 Wis. 582 (34 N. W. 725).

⁸ Joint School District v. Kernen, 65 Wis. 282 (27 N. W. 31).

In replevin, issues should be made by the pleadings, the same as in any other form of action.¹

§ 567. **The statutory allegations of the affidavit are not conclusive of the facts stated.** An affidavit for the delivery of property in replevin is not conclusive of the fact that such property was not taken for a tax, and if, upon a trial, it appears that it was so taken, the plaintiff has no right to delivery on final judgment, or, if already delivered, he can derive no advantage therefrom.² The question is not as to the truth or falsity of the affidavit, and it in no wise affects the result. The question on the trial is whether or not plaintiff was entitled to possession at the commencement of the suit.³

§ 568. **Fatal defects in affidavit—Illustrations.** An affidavit for the possession of personal property, which alleges that the property is *wrongfully*, instead of *unlawfully*, detained, as required by the statute, seems to be bad.⁴ An affidavit for an order of delivery in an action of replevin, which sets forth all the requisite averments, but omits that the plaintiff "is entitled to the immediate possession of the property," and uses no words equivalent thereto, is fatally defective.⁵ The wrongful detention is the gist of the action, and a failure to allege the fact may be taken advantage of on demurrer, in arrest of judgment, or in error.⁶ A petition which fails to state that the property is wrongfully detained, or facts from which a wrongful detention may be implied, will not support a judgment for the plaintiff. Such a defective

¹ Garrett v. Carlton, 65 Miss. 188 (3 So. 376); Maxey v. White, 53 Miss. 82.

² Kaehler v. Dobberpuhl, 60 Wis. 256 (18 N. W. 841).

³ Payne v. Bruton, 5 Eng. (Ark.) 57; Dennis v. Crittenden, 3 Hand. (42 N. Y.) 544.

⁴ L., E. & St. L. Railway v. Payne, 103 Ind. 183 (2 N. E. 582).

⁵ Paul v. Hodges, 26 Kan. 225.

⁶ Draper v. Ellis, 12 Iowa, 316.

petition is not aided by verdict.¹ An omission to allege damage is fatal.²

§ 569. **An affidavit in replevin may be amended** at any time before trial, or on the trial, even where such amendment will be in furtherance of justice.³ Thus, where the petition and affidavit in replevin were for "One frame building "now in process of erection, size 22x50, with the appurtenances thereunto belonging, and of the value of \$350," the petition was amended so as to describe the property "as all "the lumber, lath, shingles, nails, joists, boards, and material," etc., *held*, not to set forth a different cause of action,⁴ may be amended even after it has been attacked by motion.⁵

§ 570. **Damages claimed may be enlarged by amendment on appeal.** An affidavit in replevin may be amended in the circuit court on appeal from a justice court, so as to enlarge the damages claimed.⁶ Where the property is returned to defendant upon his giving bond, and he disposes of it, pending the suit, it is proper to allow plaintiff to amend his petition and increase the alleged value of the property.⁷

§ 571. **The proper way to amend is by a new affidavit** containing all that was proper in the first one and curing its defects.⁸ Such amendments are within the discretion of the court, and should be granted if in the interest of justice, but if the proposed amendment will bring in issues not properly triable, leave should be denied.⁹

¹ Staley Furnishing Company v. Wallace, 21 Mo. App. 128.

² Faget v. Brayton, 2 Har. & J. (Md.) 350.

³ Crans v. Cunningham, 13 Neb. 204 (13 N. W. 176).

⁴ Waters v. Reuber, 16 Neb. 99 (19 N. W. 687).

⁵ De Pew v. Leal, 2 Abb. Pr. (N. Y.) 131; Frink v. Flannegan, 6 Ill. 35.

⁶ Houf v. Ford, 37 Ark. 544.

⁷ McKesson v. Sherman, 51 Wis. 303 (8 N. W. 200).

⁸ Applewhite v. Allen, 8 Humph. 698; Kirkpatrick v. Cooper, 77 Ill. 566; Frink v. Flanagan, 1 Gilm. 38; Parks v. Barkham, 1 Mich. 95; Phenix v. Clark, 2 Mich. 327; Jackson v. Virgil, 3 Johns. 540; Shelton v. Berry, 19 Tex. 154; Crist v. Parks, 19 Tex. 234; Eddy v. Beal, 34 Ind. 161.

⁹ McClaughry v. Cratzenberg, 39 Ill. 123; Hellings v. Wright, 2 Har.

§ 572. **Signature and jurat may be added nunc pro tunc by amendment.** In replevin before a justice of the peace, the statement and affidavit contained all the required averments, but neither was signed by the plaintiffs, or either of them, and the justice's *jurat* to the affidavit certified that both had sworn to it; and on motion in circuit court to dismiss for this defect the evidence showed plaintiffs had not signed because the justice had advised it was unnecessary. *Held*, that the defect was formal and under the evidence subject to amendment *nunc pro tunc*, and raises no question of jurisdiction, and there was no error in permitting plaintiffs to sign the statement and affidavit and in overruling the motion to dismiss.¹

§ 573. **Amendment—Sworn to by different agent of plaintiff from original affidavit may be filed as a matter of right.** Where an affidavit in an action of replevin was made by A as agent of appellant, and a motion to quash the writ of replevin was entered by appellee, because the affidavit was insufficient, not containing the statutory requirements that the property in question was not held by virtue of any writ of replevin against the plaintiff, and a cross motion was made for leave to file an amended affidavit, which was granted, and such amended affidavit was sworn to by B as agent of appellant, *held*, that the right to amend was undeniable, and it was immaterial whether the amended affidavit was made by the same agent making the original affidavit or not.²

§ 574. **Effect of failure to amend substantial defect.** If there be a substantial variance, and the defect be either

(14 Pa. St.) 374; Poyen v. McNeill, 10 Met. 291; Simcoke v. Frederick, 1 Carter (Ind.), 54; East Boston Company v. Persons, 2 Hill, 126; Applewhite v. Allen, 8 Humph. 698; Cutter v. Rathbone, 1 Hill, 205; Cassidy v. Fleck, 20 Kan. 54.

¹Crum v. Elliston, 33 Mo. App. 591. See Bergesch v. Keirl, 19 Mo. 127; Morgan v. Morgan, 31 Miss. 546.

²Colborn v. Barton, 14 Bradw. (Ill.) 449.

not amendable, or, if amendable, be not in fact amended, in the trial court the plaintiff must fail in his suit.¹

§ 575. **Cannot thus add a new cause of action.** It is not error to refuse to allow plaintiff to amend and allege that the judgment upon which the writ defendant claims under issued, has since the levy become barred by the statute. The only question is as to the facts at the time the levy was made.² The original affidavit in replevin may be amended so as to state sufficiently what is already stated therein indefinitely.³

§ 576. **Cannot strike out part of the property by amendment on appeal.** It is error for the court to allow plaintiff to amend and strike out as to a part of the property claimed, when defendant has answered claiming a return of that property.⁴

§ 577. **May amend by adding new articles.** In replevin for fixtures wrongfully severed and removed, it is not error to permit plaintiff to amend his complaint and insert other articles not enumerated in the first complaint, and the denial in the answer filed before the amendment do not relate to the articles inserted by amendment, and a failure to answer the amended complaint is an admission as to the articles so added.⁵

§ 578. **Jurisdictional defects cannot be thus cured.** In replevin before a justice, where the affidavit does not show that the property was detained by defendant, and that it had not been seized on execution, etc., it is a fatal defect, and can not be cured by amendment on appeal.⁶

§ 579. **Cannot amend by making new parties.** Where A brought suit in replevin against B, he cannot, after taking the property, amend his petition by making C a joint defend-

¹ *Pickins v. Oliver*, 29 Ala. 528.

² *Paulson v. Nunon*, 72 Cal. 243 (13 Pac. 626).

³ *Meyer Brothers v. Lane*, 40 Kan. 491 (20 P. 258).

⁴ *Howell v. Foster*, 65 Cal. 169.

⁵ *Kirch v. Davies*, 55 Wis. 287 (11 N. W. 689); *Kelly v. Bliss*, 54 Wis. 187 (11 N. W. 488).

⁶ *Gist v. Loring*, 60 Mo. 487.

ant, when the affidavit, like the first petition, charged B alone with the wrongful detention.¹

§ 580. **Total lack of affidavit cannot be cured by amendment.** Under a statute allowing an affidavit to be amended to supply any omission or deficiency,² the entire omission of an affidavit can not be cured by supplying one on appeal.³

§ 581. **Statutory form of affidavit is but a general guide.** For a form the pleader should always consult works on pleading for his own state. In some states the statute gives a form. In such cases it is regarded only as a general guide, and must be followed with care and judgment. The pleader must adapt the form to the facts of his particular case.⁴ The forms provided by the code need not be strictly followed. A petition equivalent thereto is sufficient.⁵ Where the statute gives a particular form for a particular case, it is sufficient if the pleader follow it exactly. Where the legislature has said a particular form of affidavit in replevin is sufficient, the courts cannot say it is insufficient.⁶ In some instances courts have laid down a form of affidavit. In such cases the same care should be taken in following the prescribed form as in following statutory form.⁷ The plaintiff in replevin for detaining property must adopt the form prescribed by the statutes, and allege a receipt of the property by the defendant from the plaintiff, and refusal to deliver.⁸ I think no other court has required a statutory form to be followed so strictly, and this declaration has been held by the same court to be a mere fiction of law, and not necessary to be sus-

¹ *Bardwell v. Stubbart*, 17 Neb. 486 (23 N. W. 344).

² Missouri Revised Statutes, 1879, § 3060.

³ *Turner v. Bondalier*, 31 Mo. App. 582.

⁴ *Reigert v. Voelker*, 6 Mo. App. 53.

⁵ *Crittenden v. Steele*, 3 G. Green (Iowa), 538; *Busick v. Bumm*, 3 Iowa, 63; *Smith v. Montgomery*, 5 Iowa, 370.

⁶ *Brown v. Poland*, 54 Conn. 313 (7 Atl. 719).

⁷ *Vogel v. Babcock*, 1 Abb. Pr. 176.

⁸ *Piron v. Barden*, 5 Ark. 81.

tained by proof.¹ Where a petition in replevin pursues the form given by statutes, it must be construed as claiming such an interest in the property sued for as may be recovered in that action by the plaintiff. If, on the trial, the proof fails to show such an interest, it becomes a question of variance between the allegations and proof, which, if not amended, will prove fatal.²

§ 582. **Need not follow any particular form.** The complaint in an action for the claim and delivery of personal property does not have to be in any specific form; all that is required is that it shall contain a plain and concise statement of the cause of action.³ But where a statutory form is followed, it is understood that the plaintiff asserts such a title and claims such an interest as may be recovered in that form of action and none other.⁴ And the pleader should be careful not to depart from the recognized mode of procedure, and to follow the statute strictly where the matter is purely statutory.⁵ The affidavit should be drawn to meet the proof.⁶

§ 583. **Requisites of affidavit.** As a general rule, the statutes require the affidavit to state (1) A description of the property; (2) That the plaintiff is the owner or has a special ownership therein, and that he is entitled to the immediate possession thereof; (3) That the property is wrongfully detained by the defendant; (4) That it was not taken in execution or attachment on any order or judgment against

¹ *Beebe v. DeBaum*, 8 Ark. 510.

² *Pickens v. Oliver*, 29 Ala. 528.

³ *Western Railroad Company v. Bayne*, 75 N. Y. 1. In this case no delivery was had or demanded, but the prayer was for the surrender of certain securities or for their value. *Puterbaugh's Pleadings*, 526.

⁴ *Pickens v. Oliver*, 29 Ala. 528; *Halleck v. Mixer*, 16 Cal. 574; *Smith v. Montgomery*, 5 Iowa, 370.

⁵ *McPherson v. McElhinch*, 20 Wend. 671; *Austice v. Holmes*, 3 Denio, 245; *Pirani v. Barden*, 5 Ark. 81; *Smith v. Montgomery*, 5 Iowa, 371; *Busick v. Bumm*, 3 Iowa, 63; *Auld v. Kimberlin*, 7 Kan. 601.

⁶ *Oleson v. Merrill*, 20 Wis. 462; *Stillman v. Squire*, 1 Denio, 327; *Cummings v. Vorce*, 3 Hill, 282; *Pierce v. Van Dyke*, 6 Hill, 613; *Cox v. Grace*, 10 Ark. 87.

plaintiff; (5) That it was not taken for the payment of any fine, tax, or amercement assessed against him; (6) That it was not taken by virtue of any order of delivery issued in replevin or any other mesne or final process issued against plaintiff; (7) Provided that where exempt property is taken on a writ against plaintiff, the affidavit may be changed to show that fact, and replevin will lie for the exempt property.

§ 584. **Approved form of affidavit.** This chapter was prepared without a form for affidavit, but at the suggestion of a friend of experience, a form is inserted here that it is believed will be held to contain all the essential averments.

John Doe, Plaintiff,

In (Title of court).....

vs.

Richard Roe, Defendant.

STATE OF, COUNTY OF } ss.

John Doe, being first duly sworn according to law, says upon oath that he is the (*If made by an agent, or attorney, or other authorized person, say Abe Smith, being duly sworn, etc., says he is agent or attorney, etc., for John Doe, who is, etc.*) owner and entitled to the immediate possession (*If not the owner, state fully the special ownership and right to possession*) of the following described goods and chattels. (*Here describe them as particularly as the circumstances will permit, stating present location, if known, and particular brands, spots, marks, or numbers. If a particular description cannot be given, give the reason why and a general description. Give the value of each article, if practicable; if not, of the whole.*)

That the said goods and chattels are unjustly detained from the possession of said John Doe by said Richard Roe, and have been so unlawfully detained by said Richard Roe for days, to plaintiff's damage in the sum of \$..... (*If more than nominal damages are claimed, the elements of damage should be stated here.*)

That the said goods and chattels were not taken in execution, or attachment, or on any order or judgment against said plaintiff, or for the payment of any tax, fine, or amercement assessed against said plaintiff, or by virtue of any order of delivery issued in replevin, or on any other mesne or final process issued against said plaintiff (*here add any special statutory requirement, as in Alabama, that the cause of action accrued within two years last past*), and further saith not.

(Signature.)

Subscribed and sworn to, etc.

If the affidavit is the sole pleading filed by plaintiff, just before the jurat add "Wherefore, affiant prays judgment for

"possession of said goods and chattels, or their value," for his damages as aforesaid, and costs. The writer sees no reason why the affidavit should not be made to contain all the allegations necessary to be made by plaintiff, and this rule is followed in some courts, thus saving much needless repetition in pleading. The title of the case and court are given for convenience. If the property has been taken on execution, but is exempt, in place of that negative averment, say "Said property was taken on an execution on a judgment, (here describe the judgment) but that said goods and chattels were, and are, exempt to said John Doe under the law of this state, the said John Doe being the head of a family and a resident of this state (or set out other grounds of exemption, as tools of laboring man, family bible, etc)."

§ 585. **Another form of action should not be joined with replevin.** A claim for the delivery of personal property ought not to be joined with a paragraph for money paid, but a judgment cannot be reversed for such misjoinder.¹ The action of claim and delivery may proceed for damages alone, where there is no delivery through the fault of the defendant.² But where part of the property cannot be found and there is personal service, the plaintiff may add a count in trover,³ but the count in trover cannot include any other goods than those described in the writ, and which the officer's return shows not taken.⁴ The plaintiff may join several counts in one declaration. Thus counts for wrongful taking may be joined with counts for detention, and counts for a limited interest may be joined with a count as absolute owner, if, under both, he alleges a right to possession.⁵ Of course the averments in the subsequent pleadings can not go beyond the claim in the affidavit, as that will govern

¹ Keller v. Boatman, 49 Ind. 104.

² Miller v. Hahn, 84 N. C. 226; Holmes v. Godwin, 69 N. C. 467.

³ Karr v. Barstow, 24 Ill. 580; Nashville v. Alexander, 10 Humph. (Tenn.) 383.

⁴ Dart v. Horn, 20 Ill. 212.

⁵ Dickinson v. Noland, 2 Eng. (Ark.) 25; Cox v. Grace, 10 Ark. 87.

always.¹ Even if there is but a single count, each party may recover part of the goods if the proof shows them entitled to them.² If there are two counts—one good, the other bad—unless the record shows that plaintiff won on the good count, it will not be so presumed by the court. Parties may, by agreement, litigate the title to property not included in the writ.³

§ 586. **The affidavit need not be separate from the complaint,** and need not state that affiant claims judgment for damages or possession, though these statements are not improper. If defendant goes to trial, he thereby waives defects in the affidavit.⁴ An affidavit stating the facts in replevin before a justice is sufficient, and takes the place of both complaint and affidavit.⁵ In replevin in justice court, the plaintiff may treat and use his affidavit as a bill of particulars and file but the one paper.⁶ Where the only affidavit in replevin was that in the verification to the petition which stated the proper facts, *held*, a sufficient compliance with the statute to sustain the action.⁷

§ 587. **Affidavit takes the place of all other pleadings by plaintiff** in justice courts, and it is the only pleading necessary to be filed. Under a law which requires a bill of particulars in all cases before a justice of the peace,⁸ *held*, that this did not include replevin actions, and that the affidavit alone would be sufficient.⁹ There seems to be no reason why the affidavit should not be the only pleading filed

¹ Barnes v. Tannehill, 7 Blackf. (Ind.) 605; Cox v. Grace, 10 Ark. 87; Nichols v. Nichols, 10 Wend. 630. See Stevison v. Earnest, 8 Ill. 517; Stevens v. Osman, 1 Mich. 92.

² Seymour v. Billings, 12 Wend. 286.

³ Sanger v. Kinkade, 16 Ill. 44.

⁴ Eddy v. Beal, 34 Ind. 159; Lewis v. Brackenridge, 1 Blackf. 112; Smith v. Emmerson, 16 Ind. 355; Davis v. Warfield, 38 Ind. 461; Dunn v. Crocker, 22 Ind. 324.

⁵ Hanner v. Bailey, 30 Ark. 681.

⁶ Starr v. Hinshaw, 23 Kan. 532.

⁷ Bingham v. Hill, 38 Ohio St. 657.

⁸ § 951, Code.

⁹ Hill v. Wilkinson, 25 Neb. 103 (41 N. W. 134).

by plaintiff in all courts, and where the practice has been tried it has given satisfaction.

§ 588. **A complaint may be used as an affidavit.** In an action before a justice to recover a horse a complaint sworn to was *held* to be sufficient, it being both a complaint and an affidavit.¹ A complaint which contains all the statutory requirements sworn to will be sufficient, both as an affidavit and a complaint in replevin.²

§ 589. **Complaint—Affidavit.** If the complaint contain the statutory requirements, and is verified, it may subserve the two-fold purpose of complaint and affidavit, and its sufficiency as a cause of action may be tested by demurrer and as an affidavit by motion to quash.³ The objection that a complaint in replevin alleges a trespass and a conversion should be taken before trial; and if not so taken, and plaintiff shows a right to possession, the allegations of trespass and conversion may be disregarded as surplusage.⁴

§ 590. **Sufficiency of complaint.** In an action to recover personal property claimed to have been obtained upon credit by false representations, where the complaint shows that plaintiff sold and delivered the goods to defendant, and that, in consequence of the fraud therein duly alleged, they seek to avoid the contract of sale, the complaint sufficiently alleges a special property in the goods and a right to their possession.⁵ The allegation "that the defendants have become possessed of and wrongfully detains from the plaintiff the following goods and chattels of the plaintiff" is a sufficient allegation of ownership in the plaintiff.⁶

§ 591. **What constitutes a good complaint—Illustra-**

¹ *Stephens v. Scott*, 13 Ind. 515; *Menchrod v. Windoes*, 29 Ind. 288.

² *Cox v. Albert*, 78 Ind. 241.

³ *L., E. & St. Louis Railway v. Payne*, 103 Ind. 183 (2 N. E. 582).

⁴ *Banfield v. Haeger*, 7 Abb. New. Cas. (N. Y.) 318.

⁵ *Morrison v. Lewis*, 4 N. Y. Civ. Proc. R. 437 (Id. 49 Sup. Ct. 178); *Banfield v. Haeger*, 45 N. Y. Sup. Ct. 428.

⁶ *Van Der Minden v. Elsas*, 36 N. Y. Sup. Ct. 66; *Levin v. Russell*, 42 N. Y. 251; *Schofield v. Whitelegge*, 49 N. Y. 259.

tions. A complaint which alleged (1) wrongful taking, (2) wrongful possession, (3) unlawful conversion, is a good complaint in replevin.¹ The complaint must show a right of property and of possession in plaintiff. An allegation of wrongful detention is not sufficient. The latter is a conclusion of law; the former, the facts upon which it is based. The facts must be pleaded, and without them the conclusion of law is an immaterial statement. And an omission to aver such facts in the complaint is not cured by an averment in the answers denying ownership in the plaintiff.² It is not necessary for a mortgagee, in an action of replevin for the mortgaged property, to show in his complaint the source of his title. It is sufficient to allege his ownership, general or special; and if he alleges the mortgage, he need not allege the non-payment of the debt for which it was given.³ A complaint which alleges that the property was given by plaintiff to defendant in exchange for other personal property upon false and fraudulent representations, but which does not allege the rescission of the contract of exchange, is bad on demurrer.⁴ A complaint in replevin which sets forth the seizure and possession of the testator at his death, the appointment of the plaintiffs as his executors, and their subsequent possession of the premises, the wrongful cutting down of growing wood by certain persons not named, and the subsequent removal of the wood by the defendants, with a demand and refusal, sets forth a good cause of action.⁵ A complaint in replevin that does not allege ownership of the property, but only alleges a promise of the defendant to vest the ownership in the plaintiff on certain conditions being com-

¹ *Enos v. Bemis*, 61 Wis. 656 (21 N. W. 812); *Vogel v. Babcock*, 1 Abb. Pr. 176; *Dudley v. Ross*, 27 Wis. 679.

² *Scofield v. Whitelegge*, 49 N. Y. 259; *Pattison v. Adams*, 7 Hill, 126. See also *Bond v. Mitchell*, 3 Barb. 304; *Vandenburgh v. Van Valkenburgh*, 8 Barb. 217.

³ *Person v. Wright*, 35 Ark. 169.

⁴ *McCoy v. Reck*, 50 Ind. 283. See *Reynolds v. Copeland*, 71 Ind. 422.

⁵ *Halleck v. Mixer*, 16 Cal. 574.

plied with, is bad. If one paragraph of the complaint is bad, and the record does not show that the trial was had exclusively under a good paragraph, the judgment will be reversed.¹

§ 592. **By sheriff in case of attached property.** In replevin by a sheriff for chattels attached by him and taken from his possession by defendant, the complaint must state facts showing that such chattels were liable to seizure by virtue of the attachment, or it is bad on demurrer. If the sheriff claimed to hold under the general attachment law, his complaint in replevin must show that the property was that of the attachment defendant; if under a special attachment law, then the facts that gave him a right to seize it in attachment under that law.²

§ 593. **What the declaration or complaint should contain.** Generally, statutory provisions require that the declaration, petition, or complaint should show a wrongful taking or detention of the property claimed by the plaintiff, but that would be sufficiently shown by an allegation that the defendant forcibly took the property of the plaintiff and unjustly detained it.³ It is generally sufficient to charge that the defendant converted and disposed of the property to his own use, without stating the manner in which he converted it.⁴ A right of property or a right of possession in the plaintiff must be shown. A mere averment of wrongful detention is not sufficient, as that is a conclusion of law.⁵ If the right of the plaintiff to the property depends upon a wrongful detention without a wrongful taking, an averment in the declaration or complaint of a demand and refusal, or of other acts

¹ *Bailey v. Troxell*, 43 Ind. 432; *Wolf v. Scofield*, 38 Ind. 175; *Keesling v. McCall*, 36 Ind. 321. See affidavit.

² *Tronson v. The Union Lumbering Company*, 38 Wis. 202.

³ *Childs v. Hart*, 7 Barb. (N. Y.) 370; *Simser v. Cowan*, 56 Barb. 395; *Tell v. Beyer*, 38 N. Y. 161; *Simmons v. Lyons*, 55 N. Y. 671; *Levin v. Russell*, 42 N. Y. 251.

⁴ *Decker v. Matthews*, 12 N. Y. 313 (5 Sandf. 439).

⁵ *Scofield v. Whitelegge*, 49 N. Y. 259.

amounting to a conversion, is necessary.¹ Thus, an allegation of the conversion of property admits of proof of conversion of checks or money.²

§ 594. **Declaration.** Under the practice in some states, an affidavit is filed without other pleadings, and, after the property is taken, a declaration is filed claiming the property, etc. Under such a statute it has been *held* that the failure to file such a declaration at the first term was not cause for dismissal, but of continuance only.³ A plaintiff cannot regularly declare until the writ be returned with the names of the sureties annexed.⁴ The declaration should not include any property not taken under the writ,⁵ but may articles not in the summons.⁶

§ 595. **Declaration must follow the affidavit.** If the affidavit allege a wrongful detention, the declaration should not allege a wrongful taking also, for that would affect the damages.⁷ Where an officer, by virtue of an execution, levies upon mortgaged personal property in the hands of the mortgagor before due, and replevin is brought by the mortgagee after the mortgage money has become due, plaintiff must declare for the detention and not for the taking.⁸ While a declaration in replevin, in the *cepit*, must show a wrongful taking, it is a sufficient allegation to declare that the defendant took the property and unjustly detains the same; such an allegation presumes a wrongful taking.⁹

§ 596. **Must make issuable allegations.** A declaration

¹ Slayter v. Williams, 37 How. (N. Y.) 109; Pierce v. Van Dyke, 6 Hill, 613.

² Knapp v. Roche, 37 N. Y. Sup. Ct. 395; Devlin v. Coleman, 50 N. Y. 531; Bank v. National Bank, 60 N. Y. 40.

³ Amos v. Sinnott, 5 Ill. (4 Scan.) 440.

⁴ Wilson v. Williams, 18 Wend. (N. Y.) 581.

⁵ Sanderson v. Marks, 1 Har. & G. (Md.) 252.

⁶ Finehout v. Crain, 4 Hill (N. Y.), 537. See *affidavit*.

⁷ Newell v. Newell, 34 Miss. 385.

⁸ Randall v. Cook, 17 Wend. (N. Y.) 53.

⁹ Childs v. Hart, 7 Barb. (N. Y.) 370.

in replevin must allege by a direct and issuable averment, that the property claimed is the property of defendant.⁴

§ 597. **Artificial words not to govern.** Notwithstanding the artificial words of a declaration in detinue, if the action be grounded upon a tortious seizure by the defendant of the property mentioned, it will not be *held*, contrary to the fact, an action on contract.⁵

§ 598. **Where both affidavit and petition are used, petition need not be as specific as the affidavit,** and need not allege everything required by the affidavit,⁶ but cannot be aided in essential allegations by reference to affidavit.⁷

§ 599. **Where both are used, the affidavit is not a part of the pleadings.** In Kansas, in district court, where both a petition and affidavit in replevin are necessary, it has been *held* that the affidavit is no part of the pleadings, and the facts therein set forth form no part of the issues in the case.⁸

§ 600. **Petition—Illustrations.** In a suit to recover a horse, a good cause of action is stated when the petition states that the defendant purchased the horse of plaintiff's minor son, that the plaintiff never received the consideration paid for the horse, that the defendant knew that plaintiff did not allow said son to trade in his property, and that the son was a minor.⁹ A petition in replevin is sufficient if it allege that the plaintiff is the owner of the property in dispute, and entitled to its immediate possession, and that it is unlawfully detained by defendant. It need not aver that the property was not taken on execution, etc. These allega-

⁴ *Vandenburgh v. Van Valkenburgh*, 8 Barb. 217; *Johnson v. Neale*, 6 Allen (Mass.), 227; *Pattison v. Adams*, 7 Hill (N. Y.), 126; *Bond v. Mitchell*, 3 Barb. (N. Y.) 304; *Vaiden v. Bell*, 3 Rand. (Va.) 448.

⁵ *Elgee v. Lovell*, 1 Woolworth (8th circuit), 102.

⁶ *Bosse v. Thomas*, 3 Mo. App. 472.

⁷ *Wilhite v. Williams* (Kan.), 21 P. 256.

⁸ *Crawford v. Furlong*, 21 Kan. 698; *Hoisington v. Armstrong*, 22 Kan. 110.

⁹ *Ice v. Lockridge*, 21 Texas, 461.

tions are required only in the affidavit on which the action is based.¹ The gist of the action of replevin is the right to immediate possession by the plaintiff, and the unlawful detention by the defendant, and these facts must be stated by the petition.² The petition need only state plaintiff's right to the possession of the property, its description and value, and that it was wrongfully taken or unlawfully detained from him.³

§ 601. **Plaintiff must stand or fall by the title alleged in his petition.** But where plaintiff claims as sole owner, he must stand or fall on that claim, and cannot, if his alleged title turns out to be invalid as against the true owner, fall back upon an alleged lien. The claim of title is a waiver of any lien, and, in any event, before he can claim the chattel by virtue of the lien, the false claim of title must be abandoned, the title of the true owner conceded, and the claim reduced to one of lien.⁴ In an action for the recovery of specific personal property, the plaintiff must state in his petition the extent of his interest in the property, and such allegation is a material one; and where he states that he is the absolute and unqualified owner, a chattel mortgage of the property to him is not evidence to sustain such allegation, and should be rejected, when offered for that purpose, and where that is the only evidence of plaintiff's ownership, the court should have directed a verdict for defendant.⁵

§ 602. **Petition should be construed as a whole.** All the allegations of a petition in replevin must be considered together, and if, when so considered, it appear that a good cause of action is not stated, a demurrer will lie.⁶

§ 603. **Special damages must be specially pleaded.** When

¹ Daniels v. Cole, 21 Neb. 156 (31 N. W. 491).

² Williams v. West, 2 Ohio St. 85; Haggard v. Wallin, 6 Neb. 271.

³ Catterlin v. Mitchell, 27 Ind. 298; Estee's Pleadings, 2151, 4185-4191.

⁴ Hudson v. Swan, 83 N. Y. 552; Everett v. Saltus, 15 Wend. 474; Holbrook v. Wright, 24 Wend. 169; Mexal v. Dearborn, 12 Gray, 336.

⁵ Kern v. Wilson, 73 Iowa, 490 (35 N. W. 594).

⁶ Houghtaling v. Hills, 59 Iowa, 287 (13 N. W. 305).

consequential damages are claimed which do not necessarily and naturally result from the tortious act, they must be specially alleged.¹ Where there are circumstances of willful wrong or insult that would enhance plaintiff's damages, he must plead them specially, stating the circumstances fully.² In replevin for a mare, damages claimed for her losing flesh and the breeding season, should be specially pleaded.³ Special damages to the property must be specially pleaded, but "a general claim of damages at the conclusion of the declaration will be sufficient to entitle the party to all such damages as are the natural and immediate consequence of defendant's acts, of which the declaration complains."⁴ Without alleging special damage in the complaint, the plaintiff may recover damage for the depreciation resulting from the lapse of time.⁵ The general claim for damages at the conclusion of the declaration will be sufficient to entitle the plaintiff to such damages as are the natural and immediate result of the act complained of, and no more. An entire omission to claim damages has been held to be a fatal error.⁶

¹ *Burrage v. Melson*, 48 Miss. 237; *Damson v. Roach*, 4 Humph. (Tenn.) 134.

² *Newell v. Newell*, 34 Miss. 385. On this subject see Ch. Pl. 428. Where the damages are the natural or proximate result of the wrongful act, they need not be specially pleaded, but otherwise they must be. See *V. & M. R. R. Co. v. Ragsdale*, 46 Miss. 459; *Scofield v. Ferris*, 46 Pa. St. 438; *De Forest v. Lute*, 16 Johns. 122; *Nunan v. City, etc.*, 38 Cal. 689; *Burrage v. Nelson*, 48 Miss. 239; *Park v. McDaniel*, 37 Vt. 595; *Shaw v. Hoffman*, 21 Mich. 155.

³ *Stevenson v. Smith*, 28 Cal. 102.

⁴ *Burkholder v. Rudrow*, 19 Mo. App. 60; *Christol v. Craig*, 80 Mo. 375.

⁵ *Young v. Willett*, 8 Bosw. (N. Y.) 486.

⁶ *Faget v. Brayton*, 2 H. & J. (Md.) 350.

CHAPTER XXIII.

THE WRIT—ITS HISTORY AND USE.

Section.	Section.
Originally the writ of replevin	The description may be
was not returnable . . . 604	amended 620
The writ <i>non omittas</i> . . . 605	If there is a total lack of de-
<i>Alias</i> and <i>pluries</i> writs . . . 606	scription, the writ is void . 621
Writ issued only at Westmin-	Writ need not state the value
ster 607	of the property 622
Origin of present writ and pro-	Where bond is filed first . . 623
ceeding 608	Rule in regard to replevin of
Writ of <i>withernam</i> . . . 609	attached property . . . 624
Conclusion 610	The writ is under the control
Issuing of the writ merely a	of plaintiff 625
ministerial act 611	Date of the writ is not conclu-
Must be by authority and	sive as to the time of com-
under a valid law . . . 612	encing the action . . . 626
To whom directed . . . 613	Writ may be amended on trial
Where the sheriff is a party di-	as to value 627
rected to the coroner . . . 614	Misnomer, how amended . . 628
What the writ should contain 615	<i>Alias</i> writ, when issued . . 629
When returnable . . . 616	There can be no new service
Description 617	under a void writ . . . 630
The same—Illustrations . . 618	Cannot take part of the prop-
Sufficient if with outside help	erty and arrest defendant
the property can be iden-	too on same writ . . . 631
tified 619	

§ 604. Originally the writ of replevin was not returnable. It was a judicial writ issued to the sheriff, and gave him power to hear and determine the matter complained of.¹ Its form was as follows:

“The king, etc., to the sheriff, etc.:

“We command you, that justly and without delay you cause to be “replevied the cattle of B, which D took and unjustly detains, as it is

¹ 3 Blacks. 238; Crabb's Hist. Eng. Law, 116; Glanvil, Book 12, Chap. 12.

“said, and afterwards thereupon cause him justly to be removed, that we may hear no more clamour thereupon for want of justice, etc.

“Pledges,

If the defendant claimed to own the property, the sheriff could proceed no further, as the sheriff could only try the caption and detention and not the title under the writ. But the plaintiff could sue in an appeal of felony, and if he was successful he got his goods, and the defendant was treated as a robber.¹ At first the defendant could not set up a claim of ownership in the replevin suit, it being confined to the right of possession—that is, the legality of the distress. Where the defendant claimed ownership, the replevin suit was held in abeyance until the writ of *de proprietate probanda* could be sued out, and the question of ownership settled by it.²

§ 605. **The writ non omittas.** If the sheriff's return to the writ stated that the beasts had been traced to some liberty or place where he had not the authority to go and seize them, and that the bailiff or keeper thereof did not answer his demand for them, the *non omittas* issued. This was an *alias* or *pluries* writ, and empowered the sheriff to enter the liberty and serve his writ by taking the property. From this old form arose the expression yet frequently found in legal writs, “and this you are not to omit, under the penalty of the law.”³

§ 606. **Alias and pluries writs.** Where the first writ was not served, the plaintiff was entitled to an *alias* and

¹ Mirror, Chap. 2, § 26; Britton, Vol. I. Chap. 28. This appeal of felony was in this form:

“John, who is here, appeals Peter, who is there, that, whereas, the same John, on such a day, and had a horse, which he kept in his stable. The same Peter there came, and the same horse feloniously, as a felon, stole from him, and took and led away, against the peace, and that this he wickedly did, the same John offers to prove by his body, as the court shall award that he ought to do it.”—Britton, Vol. I. p. 115.

² Britton, Vol. I. Chap. 28; Mirror, Chap. 2, § 26; *ex parte Chamberlain*, 1 Scho. & Lif. 320.

³ Gilbert's Hist. & Prac. of Court of Com. Pleas, 26; Reeve's Hist., Chap. 10, p. 93.

then to a *pluries*, as a matter of right. In practice, though the writs were all usually issued at once,¹ and he could deliver all three of them to the sheriff at the same time if he chose, or he could deliver the *alias* and *pluries* only.² The writ and the *alias* did not differ materially, but the *pluries* always contained the clause *vel causam nobis certifies*, to serve it or certify the reason for not serving—and was always made returnable. The reason for this seems to have been that from a legal point of view the sheriff had twice failed to do a legal duty imposed upon him by the original and *alias* writs respectively. Therefore, he was no longer to be trusted with judicial power. He must now answer to the court. If he had failed to execute the writ and do justice, he was fined for disobedience.³ If, however, the *pluries* was the only writ delivered to him, he could show this fact and thus excuse himself, as he was not liable to answer to the court until the *pluries* came to his hands regularly after the others. In other words, it was not a *pluries* so far as he was concerned, but an original writ.

§ 607. **Writ issued only at Westminster.** The king's chancellor, who held his court at Westminster, could alone issue the writ. When issued, the writ was usually sent by special messenger, but with their primitive modes of travel the delay thus occasioned was a very serious annoyance.⁴

§ 608. **Origin of present writ and proceeding.** To remedy these delays the statute of Marlbridge provided⁵ for the action by plaint (affidavit). Under this statute the sheriff or a deputy under the writ went to the place where the cattle were and demanded sight of them.⁶ If this were de-

¹ F. N. B. 68e; Gilbert on Replevin, 75; Wells on Replevin, § 13.

² Anon Dyer, 189a; Thomas of Môtysdale v. The Abbot of Cirencester, Year Book, 30 E. 1, 18.

³ Freeman v. Bluet, 12 Mod. 395.

⁴ 3 Blacks. 50 & 273; Year Book, 30, 31; E. I., p. 26; Potter v. Hall, 3 Pick. 368.

⁵ Ch. 21, Stat. Marl. 52 Henry III. (A.D. 1267).

⁶ Reeve's Hist., Vol. II., p. 48; Ackworth v. Kempe, Douglas, 40; Blackwell v. Hunt, Noy, 107.

nied, he raised the hue and cry, and in case of actual resistance arrested the offender and put him in jail.¹ If the distress had been confined in a close or other stronghold, the sheriff, after demand, was authorized to break and enter. And to further deter the lords or barons from secreting property taken for distress, the statute of West., 1 Ch. 17, provided that the house or castle so used should be razed and destroyed. If no resistance was made, the sheriff took the property, delivered them to the plaintiff, and fixed the day in which the parties should appear in court and try the matter.² In 1285 a statute was passed to remedy certain evils in the operation of the law of replevin which provided among other things that the sheriff should not only take security for the suit, but also "for the beasts or cattle to be returned, "or the price of them, if return be awarded." This is the first appearance of the bond as used to-day in replevin.³ To guard against replevins *in infinitum*, where a writ of *retorno* was awarded, it contained a clause, "And that you do not "again deliver them upon complaint of——— (plaintiff) "without our writ, which should expressly mention the afore-said judgment." (The judgment in the first replevin.) This was made necessary from the practice which had grown up for the tenant rather than to have litigation with the lord to allow judgment to go against him by default and immediately replevy again, thus keeping the property in his possession without a trial, and putting the lord to the continual expense and trouble of being prepared for trial.

§ 609. **Writ of withernam.** If the defendant had *eloined* the distress—that is, driven it out of the county or concealed it so that it could not be reached by replevin, on a return showing that fact—the plaintiff was entitled to a *capias* in *withernam*, a word of Saxon origin—*weder*, other, and *naaum*, distress. Under this writ the plaintiff was en-

¹ Britton, Vol. I., p. 137.

² Reeve's Hist., Vol. II., p. 48.

³ Stat. of West. 2, Ch. 2 of Edward I.; Year Book, 30, 31, E. I., p. 31.

titled to have *other* property in lieu of those wrongfully concealed by the defendant. Goods taken by this process were held until the original distress was forthcoming.¹ This writ has only been recognized in a limited manner in this country, but perhaps our statute allowing a replevin suit where the property is not taken to proceed as a suit for damages may have its origin in this writ.² The judgment in *withernam* was substantially the same as that given in Holy Writ: "Let the judgment be this: That he lose the like member "as he has destroyed of the plaintiff's."³

§ 610. **Conclusion.** Many other peculiarities might be traced in the development of the writ, but all that is necessary to a correct understanding of it, as used to-day, has been given (see Chapter I.), and we will now proceed to consider it in the light of our present system.

§ 611. **Issuing of the writ merely a ministerial act.** On the filing of an affidavit the writ should be issued at once by the clerk, or if it be in an inferior court, having no clerk, by the justice. The writ may be issued by the clerk without an order of the court.⁴

§ 612. **Must be by authority and under a valid law.** But the writ must be issued by one having authority. Thus, where one not a justice issued a writ of replevin, it was void; but when defendant appeared and took a change of venue to a legal justice, he waived the error.⁵ And there must be a valid law providing for the action. A writ of replevin issued under a repealed statute is absolutely void, and no protection to the officer, and the court has no power to quash such a

¹ F. N. B. 73 F.; *Moor v. Watts*, 2 Salk. 581; *Anon Dyer*, 188 b.

² *Bennett v. Berry*, 8 Blackf. 1; *Waglam v. Cowperthwaite*, 2 Dall. (Pa.) 68; *Weaver v. Lawrence*, 1 Dall. 167; *Swann v. Shewell*, 2 Har. & G. (Md.) 283; *McColgan v. Huston*, 2 Nott. & M. (S. C.) 444; *Rathbun v. Ranney*, 14 Mich. 387.

³ Exodus, Ch. 21, ver. 24; Britton, Vol. I., p. 122.

⁴ *Pennington v. Streight*, 54 Ind. 376.

⁵ *Graves v. Shoefelt*, 60 Ill. 462.

writ and order the return of the property. And a general appearance does not give the proceeding life.¹

§ 613. **To whom directed.** It should be addressed the same as any other writ issued by the same authority to the proper executive officer of the court in which the affidavit is filed. This is usually the sheriff.

§ 614. **Where the sheriff is a party, directed to the coroner.** If the sheriff be a party to the suit or have an interest, the statutes usually provide that the writ be addressed to the coroner. In such cases the direction is the only point in which the writ differs from the ordinary form. Where a writ was addressed to the sheriff in a case where it should have been addressed to the coroner, the plaintiff was permitted to amend it by inserting the word coroner in the directory clause.² Under a statute requiring that the writ should issue to the coroner where the sheriff was interested, the affidavit for replevin must show this interest; but if it does not, and is otherwise regular, it is an informality which may be amended. An affidavit which alleges that the defendant was a deputy sheriff, and in that official capacity seized the property sought to be replevied, shows that the sheriff is interested in the case.³ A coroner acting in place of the sheriff by virtue of a statutory provision is protected in the service of replevin papers to the same extent and in the same manner that a sheriff would be in a similar case.⁴ The word party, in the statute requiring that writs be served by a coroner where the sheriff is a party, means a party of record.⁵

§ 615. **What the writ should contain.** The writ should contain a command to the officer to seize the property described, and to summon the defendant to appear at a certain

¹ *Castle v. Thomas*, 16 Minn. 443; *Hicks v. Mendenhall*, 17 Minn. 453.

² *Simeoke v. Frederick*, 1 Ind. 54.

³ *Cassidy v. Fleck*, 20 Kan. 54.

⁴ *Manning v. Keenan*, 73 N. Y. 45.

⁵ *Douglass v. Gardner*, 63 Me. 462.

time in the court issuing the writ and answer. In some states the practice is to issue two papers—one called the writ of replevin, which commands the taking of the property; the other a summons, which summons the defendant to appear as in an ordinary action. But both should be issued at once, as it is but one act. It is a great irregularity for the clerk of the district court to issue an order of delivery in replevin several days before the issue of the summons; but, where the mistake is purely that of the clerk, and the defendant, after the service of both writs, answers without raising any question concerning such irregularity, it is waived.¹ Usually both writs are now contained in one. The essential part of a writ of replevin is the command to seize the property. Jurisdiction of the person may be acquired by the writ of replevin or by service of summons. The writ of replevin need not contain a command to summon the defendant.² But the better practice is to make it a summons also.³ The writ need not show that the affidavit upon which it is founded was made,⁴ or that the property belonged to plaintiff, or that it was distrained.⁵ Where it appears from an order of replevin that it was issued out of the district court of the county in which it was served; that it was duly addressed to the sheriff of the county; that it stated the names of the parties to the action; that it commanded the sheriff to take the property described in the writ, deliver it to the plaintiff, and make due return of the writ, and was properly signed and sealed, *held*, that the writ was not void, though the body of the order did not state the court in which the action was brought. It was an irregularity merely, and not fatal.⁶

¹ Kennedy v. Beck, 15 Kan. 555.

² Western Publishing Company v. Battineau, 34 Minn. 239 (25 N. W. 405).

³ Swann v. Shewell, 2 Har. & G. (Md.) 283.

⁴ Magee v. Siggerson, 4 Blackf. 70; Snedeker v. Quick, 11 N. J. L. (6 Hals.) 179.

⁵ Watson v. Watson, 9 Conn. 140.

⁶ State v. Wilson, 24 Kan. 50.

§ 616. **When returnable.** Usually the statute fixes the return day; where it does not, but is left to the officer issuing it, it should be made returnable, the same as any other writ. A writ of replevin, tested at one term and returnable at the second term thereafter, is voidable.¹ The law does not look with favor on any delay in replevin cases. It should not be made returnable on Sunday or a legal holiday, but such errors are waived by pleading and going to trial.²

§ 617. **Description.** The writ should follow the description of the property, as given in the affidavit, exactly. The description in the affidavit is supposed to be drawn with the express object in view of enabling the officer to identify the property, and the writ should follow it closely. If there be a defect or uncertainty in the description, so that it is doubtful as to what property is to be taken, the sheriff may refuse to serve the writ.³

§ 618. **The same—Illustrations.** The description, "two yearlings, red and white in color," is sufficient in a writ of replevin.⁴ A command to take the goods and chattels, which Moses Quick took and unjustly detains, of the plaintiff, was held insufficient.⁵ The description in the writ must be certain to a general intent.⁶ Where a writ commanded the sheriff to replevy all the "goods, stock, and fixtures in store at Johnston, at a place called Dry Brook, occupied by said L. (the defendant), of the value of \$800, and books of account and evidences of indebtedness, showing the indebtedness of persons to said Leach of the value of \$50," it was held, on demurrer, that the property directed to be replevied was described with sufficient particularity.⁷

¹ Cayward v. Doolittle, 6 Cow. (N. Y.) 602.

² Pierce v. Reh fuss, 35 Mich. 53. See Bryant v. The State, 16 Neb. 651 (21 N. W. 406).

³ Smith v. McLean, 24 Iowa, 324; Snedeker v. Quick, 6 Halst. (N. J.) 179; Magee v. Siggerson, 4 Blackf. 70.

⁴ Kelso v. Saxton, 40 Mich. 666; Farwell v. Fox, 18 Mich. 166.

⁵ Snedeker v. Quick, 6 Halst. 179. See Pope v. Tillman, 7 Taunt. 642.

⁶ Taylor v. Wells, 2 Saund. 74.

⁷ Waldron v. Leach, 9 R. I. 588.

§ 619. **Sufficient if with outside help the property can be identified.** No matter how particular the description may be, the officer would be obliged to have the property pointed out by one acquainted with it in very many cases, and the courts have held that any description which, by the aid of outside parties acquainted with the property, would enable the officer to take the right property, was good.¹ The office of a description in the writ is to bring certain property into court. If the officer brings the right property in, though the description be faulty, it has answered every purpose of a faultless description. The description commanding the officer to replevy "the goods and chattels following, viz.: the "contents of a grocery store," describing the store and stating the person by whom the goods were taken and held, is not so vague and indefinite as to be bad on demurrer.²

§ 620. **The description may be amended** to correspond with the real description,³ or by adding to the description "of the value of \$25."⁴ Where there is no uncertainty as to the property to be taken, and the right property was taken on a writ of replevin, a variance between the description in the affidavit and that in the writ may be cured by amending the writ to conform to the affidavit.⁵

§ 621. **If there is a total lack of description, the writ is void.** A description in an affidavit attached to the writ is not sufficient; it must fail.⁶ Where the writ omits to describe the articles to be taken, it will be quashed even after appearance.⁷ If a separate summons for the defendant be issued, it need not describe the goods; it is only where there

¹ *Sexton v. McDowd*, 38 Mich. 148.

² *Litchman v. Potter*, 116 Mass. 371.

³ *Gardner v. Lane*, 98 Mass. 517.

⁴ *Jaques v. Sanderson*, 8 Cush. (Mass.) 271.

⁵ *McCourt v. Bond*, 64 Wis. 596 (25 N. W. 532). Here the affidavit said one "Humpstead piano No. 17945," the writ one "Emerson piano," but the right piano was taken under the writ.

⁶ *Patterson v. Parsell*, 38 Mich. 607.

⁷ *Snedeker v. Quick*, 6 Halst. (N. J.) 176; *De Witt v. Morris*, 13 Wend. 495.

is a command to take goods that the description is required.¹ The fact that the description in the writ is of such an interest as should not be made subject to replevin does not deprive the court of jurisdiction to award a judgment of return where the writ is quashed. It is only where there is no description at all that the jurisdiction fails.²

§ 622. **Writ need not state the value of the property.** While it is necessary that the complaint or petition in replevin state the value of the property, it is not necessary that the writ state its value.³ It is not necessary in a replevin writ to allege the value of the goods to be replevied.⁴ If alleged, it may, under some circumstances, be admissible against the plaintiff as evidence of value.⁵ The appraisal or agreement determines the value for all purposes of the case.⁶

§ 623. **Where bond is filed first.** In some states the bond must be given and approved before the writ issue. In that case, the approval is a ministerial act also, and it is accepted and approved by the party issuing the writ. Under such a practice it has been held that the writ could be taken out at any time after giving of the bond, so that the case would stand for trial at the first term of the court thereafter.⁷ Under such statutes the bond is jurisdictional, and the omission to give bond can not be cured. Where a justice of the peace issued a writ of replevin without a bond, *held*, that he was liable for all damage sustained by defendant, and the fact that bond was subsequently given and money deposited would not relieve him from his liability.⁸ The bond need not be recited at length in the writ.⁹

¹ *Finehout v. Crain*, 4 Hill, 537.

² *Humphrey v. Boyn*, 45 Mich. 565 (8 N. W. 556).

³ *State v. Welch*, 37 Wis. 196.

⁴ *Pomeroy v. Trimper*, 8 Allen, 398; *Blake v. Darling*, 116 Mass. 300.

⁵ *Clap v. Guild*, 8 Mass. 153; *Barnes v. Bartlett*, 15 Pick. 71.

⁶ *Leonard v. Hannon*, 105 Mass. 113.

⁷ *Luther v. Arnold*, 7 Rich. (S. C.) 697.

⁸ *Hannum v. Norris*, 21 Kan. 114.

⁹ *Watson v. Watson*, 9 Conn. 140.

§ 624. **Rule in regard to replevin of attached property.** Where the plaintiff desires to replevy property, the officer having it in possession is the proper party against whom the writ should run, unless there be some statutory provision directing otherwise. It should not run against the plaintiff in attachment.¹

§ 625. **The writ is under the control of plaintiff.** In a replevin action the writ is under the control of the plaintiff, and it is his duty to see that it is properly served by a seizure of the property, and where he goes to trial without calling the court's attention to defects in the service, it will be presumed to have been properly served, and property put in plaintiff's possession.² The plaintiff in replevin has full control of the writ, and may recall it after it is in the officer's hands. The suit is deemed commenced from the taking out of the writ, and a reasonable delay before delivering it to the officer does not postpone the date of commencing the suit.³

§ 626. **Date of the writ is not conclusive as to the time of commencing the action,** and the fact as to the date of commencement of the suit may be shown by competent evidence. The presumption, unless the contrary is shown, is that the suit was commenced and the writ issued after the cause of action accrued.⁴

§ 627. **The writ may be amended** on the trial as to the alleged value of the property,⁵ or by striking out superfluous words.⁶ A motion to quash a writ in replevin for any defect which is amendable dispenses with the necessity to amend, and should be overruled for the reason that the writ has served its purpose in bringing the parties before

¹ Maxey v. White, 53 Miss. 80. See *ante*, Chap. XX.

² Laing v. Remuson, 2 N. M. 245.

³ McMillan v. Larned, 41 Mich. 521.

⁴ Federhen v. Smith, 3 Allen, 119. See Swift v. Crocker, 21 Pick. 241; Seaver v. Lincoln, 21 Pick. 267.

⁵ Briggs v. Wiswell, 56 N. H. 319.

⁶ Poyen v. McNeill, 10 Metc. (Mass.) 291.

the court.¹ A writ of replevin will not be quashed before service.²

§ 628. **Misnomer—How amended.** Where there has been a misnomer of the defendant in replevin, the court may, after the service of the writ, but before the execution of the replevin bond, permit the plaintiff to amend by filing a new affidavit, and thereupon amend the writ by inserting the true name.³

§ 629. **Alias writ when issued.** Where defendant in an action of replevin is not served, or is improperly served, the suit must be continued and a second writ issued, the same as in any other form of action. A writ served after the return day will not give the court jurisdiction over the person of the defendant, but all defects and irregularities in the service are cured by plea.⁴ In Arkansas, if a writ of replevin is improperly executed, the clerk can issue an *alias* without an order of court.⁵ An *alias* writ of replevin may be issued for the purposes of personal service merely, where the property has been seized on the original writ and turned over to the plaintiff, but there has been a failure of personal service for any reason during the lifetime of the original writ.⁶ This would seem to be the proper practice.⁷ An *alias* writ of replevin may be issued and directed to the sheriff of a county other than that in which suit is brought.⁸ This should always be done where the property is in two different counties.⁹ Although there may be no authority to issue an *alias* writ of replevin, it does not follow that the defendant will be entitled to a return of the property seized by virtue

¹ Spratley v. Kitchens, 55 Miss. 578.

² Shewell v. McKinley, 1 Miles (Pa.), 54; English v. Dalbrow, 1 Miles (Pa.), 161.

³ Parks v. Barkham, 1 Mich. 95.

⁴ O'Brien v. Haynes, 61 Ill. 494.

⁵ Pool v. Loomis, 5 Ark. 110.

⁶ Bell v. Judge, etc., 26 Mich. 414.

⁷ O'Brien v. Haynes, 61 Ill. 495.

⁸ Hiles v. McFarlane, 4 Chand. (Wis.) 89.

⁹ Consult *ex parte* Johnson, 7 Cow. 424; Snow v. Roy, 22 Wend. 602.

of that writ.¹ In Florida the supreme court has power to issue a *pluries* writ of replevin.² Where only part of the property named in the first writ is taken, an *alias* writ should issue for the rest.³ In New York, if a writ of replevin is sued out, and only part of the property claimed found, the plaintiff is not bound to accept part, but may arrest the defendant.⁴

§ 630. **There can be no new service under a void writ.** Where service of a writ of replevin is set aside after the return day, there can be no new service. It operates as a discontinuance, and the defendant can proceed accordingly, and have a return awarded, or damages, as he may elect.⁵

§ 631. **Can not take part of the property and arrest defendant too on same writ.** In New York, where the sheriff may arrest the defendant if he cannot get the property, it has been held that he could not arrest defendant if he took part of the property on the same writ, but he could refuse to receive a part of the property and take the body, or he could return the writ with the property found and issue an *alias* for the rest, and take the body on that.⁶

¹ *Maxon v. Perrott*, 17 Mich. 332.

² *Branch v. Branch*, 6 Fla. 314.

³ *Maxon v. Perrott*, 17 Mich. 335.

⁴ *Snow v. Roy*, 22 Wend. (N. Y.) 602.

⁵ *Forbes ex rel. v. The Judge, etc.*, 23 Mich. 497.

⁶ *Lowry v. Mansfield*, 3 How. Pr. 88.

CHAPTER XXIV.

SERVICE OF THE WRIT.

	Section.		Section.
Duty of the sheriff under a writ of replevin	632	Officer can not take property from the person	649
The officer should serve the property first	633	May sever articles attached to real estate	650
Service on the property means actual seizure	634	A replevin writ cannot be executed on Sunday	651
Sheriff's right of possession limited	635	Sheriff may take the property named in his writ when found in a stranger's hands	652
Constructive possession, when good	636	The contrary doctrine has been held under some statutes	653
Failure to serve the defendant is cured by appearance .	637	The officer in all cases should use a sound discretion .	654
The sheriff's duty to take bond—Liability for neglect .	638	Defendant does not have to assist the officer	655
Measure of damages where officer has lost the replevin bond	639	Power of court to compel defendant to surrender property	656
Should hold property to allow plaintiff to give bond . .	640	Secreting or driving property away is not contempt . .	657
Sheriff does not have to prepare bond	641	Should make return to the court issuing the writ . .	658
Must use good judgment in serving the writ	642	The return should be made full and complete and without delay	659
Must see that the writ is regular on its face	643	An officer's return is a part of the record	660
Officer protected from trespass suit in service of .	644	The return is conclusive between the parties	661
And trover will not lie against the officer	645	Return cannot be impeached by statements of sheriff .	662
The writ is no protection to the plaintiff	646	The return may be amended .	663
May break and enter to serve the writ	647	If served on defendant, but not on the property, the action proceeds as in damages	664
Sheriff should make his authority known	648		

§ 632. **Duty of the sheriff under a writ of replevin.** The sheriff is presumed to know the law, and it is his duty, on the receipt of a writ of replevin, to proceed immediately to execute it, having as his only guide the statutes of the state in which he is an officer. He must make all reasonable efforts to find the property described in his writ by search and inquiry, and must promptly avail himself of all information given him by plaintiff or others that will lead to its discovery.¹ It not infrequently happens that the very purpose of the writ is defeated by delay. Where this is the case, the sheriff would undoubtedly be liable in damages, unless he had some legal excuse for the delay.² He should make the same effort to serve the defendant personally as in case of an ordinary summons. His liability is personal, and he cannot escape from a judgment for damages by resigning or by the termination of his term of office.³ He is responsible for the acts of his deputies also, their acts being his acts in law.⁴ Where there is a reasonable doubt, he may require indemnity before he proceeds, but he should not search for doubts.⁵ Where the law requires a duty of an officer, the presumption always is that he has done his duty if he has acted at all.⁶

§ 633. **The officer should serve the property first.** As we have just shown, the essential part of a writ in replevin is the command to seize the property; so the first duty of the officer, on receiving a replevin writ, is to seize the property, and when this is done, he should serve the defendant as promptly as possible. The important thing in replevin

¹ *Bosley v. Farquar*, 2 Blackf. 66; *Loughlin v. Thompson*, 76 Cal. 287.

² *Hinman v. Borden*, 10 Wend. 367; *Lindsay Exrs. v. Armfield*, 3 Hawks. (N. C.) 548; *Kennedy v. Brent*, 6 Cranch, 187; *Whitney v. Butterfield*, 13 Cal. 339; *Payne v. Drews*, 4 East. 523; *Van Winkle v. Udall*, 1 Hill, 559.

³ *Stillman v. Squires*, 1 Denio, 328.

⁴ *Grinnell v. Phillips*, 1 Mass. 530; *Tuttle v. Cook*, 15 Wend. 274; *Poinsett v. Taylor*, 6 Cal. 78; *King v. Chase*, 15 N. H. 9.

⁵ *State v. Jennings*, 14 Ohio St. 78; *Colt. v. Eves*, 12 Conn. 243.

⁶ *Shorey v. Hussey*, 32 Me. 580.

is the seizure of the property; this brings the property before the court. The service on the defendant is secondary, but is necessary before a personal judgment can be rendered against him, unless he waives it by pleading.¹ It is the duty of the officer to serve a copy of the writ on the defendant, and his failure to do so makes him liable for damages caused thereby; but this failure does not affect the jurisdiction of the court over the property seized.² The prime object of an action of replevin is to put the plaintiff in possession of the property, and when a writ is sued out and proper bond given, it is the first duty of the officer to seize the property and then serve the defendant, if he can be found. It is not a compliance with his duty to merely serve the defendant. It is the imperative duty of the officer to seize the property if it can be found; if he fail in this, he is liable on his official bond.³ Where property is replevied, the sheriff should take an inventory and invoice of its value, and a receipt from the plaintiff for the same, which he should return with his writ.⁴ It is immaterial to the defendant which is done first; he can take no advantage of the service in this respect.⁵ In Maine the writ of replevin should be served as other writs are in the same court.⁶ In Vermont a constable cannot replevy attached property, and a writ of replevin issued to and served by a constable is void.⁷ But in Vermont a replevin is not an original action, but an appendage to an original action.⁸ If the sheriff cannot find all the property, he should take all he can find.⁹

¹ *Baker v. Dailey*, 6 Neb. 465.

² *Aultman v. Steinan*, 8 Neb. 109.

³ *The People v. Wiltshire*, 9 Bradw. (Ill.) 374; *Abrams v. Jones*, 4 Wis. 806.

⁴ *The People, Use, &c., v. Core*, 85 Ill. 248.

⁵ *State v. Wilson*, 24 Kan. 50.

⁶ *Lord v. Poor*, 23 Me. 569.

⁷ *Ralston v. Strong, Brayt.* (Vt.) 216; *Id.*, D. Chip. (Vt.) 287.

⁸ *Green v. Holden*, 35 Vt. 315.

⁹ *Smith's Sheriffs*, 285.

§ 634. **Service on the property means actual seizure.** A constructive seizure will not do. Where the sheriff left the property in the hands of the defendant, merely taking his receipt therefor, *held* an act without authority, and that the property was still in defendant's possession.¹ Every provision of the statute must be strictly complied with.²

§ 635. **Sheriff's right of possession limited.** The sheriff's right of possession before the giving of bond is only for a limited purpose, for the purpose of appraisal and to allow plaintiff to get the proper bond. He should proceed to appraise it promptly, and if the bond is not given within the statutory time or a reasonable time, where the statute does not fix a time, he should return it to the defendant. If bond is given, he surrenders possession as provided by statute.³

§ 636. **Constructive possession—when good.** Where the property consists of many articles, possession by a keeper has been held good; thus, a writ of replevin against the furniture of a large hotel is to be considered as levied from the time the sheriff placed an officer or agent in possession of the hotel.⁴

§ 637. **Failure to serve the defendant is cured by appearance.** Though regularly a sheriff, in taking goods under a writ of replevin, should summon the defendant according to the command of the writ, yet, if he neglects to do so, and the defendant voluntarily appears in court, the omission to summon him is cured.⁵ After defendant's property has been taken on a writ of replevin, he is not bound to wait until he is served with summons before appearing. He has a

¹ Davis v. Bayliss, 51 Iowa, 435. The Iowa statute provides that defendant may retain the property by giving bond; this he did not do, but merely receipted for it to the sheriff.

² Hutchinson v. McClellan, 2 Wis. 17; Elmore v. Garvey, 4 Wis. 152.

³ Smith v. Whiting, 97 Mass. 316; Wolcott v. Meade, 12 Met. (Mass.) 516; State v. Stevens, 14 Ark. 264.

⁴ Barbour v. White, 37 Ill. 164.

⁵ Swann v. Shemwell, 2 Har. & G. (Md.) 283.

right to appear immediately.¹ Defects in service on the defendant are waived if he appears generally and goes to trial.²

§ 638. **The sheriff's duty to take a bond—Liability for neglect.** When the sheriff takes the property it is his duty to hold it until proper bond is given for it. This is usually done by the plaintiff, but where the statute provides that the defendant may retain it on giving bond, the rule is the same. The officer is responsible for it until he can legally turn it over to some one else. If he fails in his duty in this regard, he is liable on his sheriff's bond to the party damaged. If he fails to take a bond at all, and surrenders possession of the property, or takes a bond in a less amount than required by the statute, and it proves insufficient, the party injured may recover the amount of his damage without regard to the value of the property.³ Where the suit is for taking insufficient security, it has been *held* that the sheriff's liability was limited to an amount equal to the penalty in the replevin bond.⁴ If the sheriff fails to take a statutory bond, he is liable for all damages resulting from his careless act, but is not liable in contempt.⁵ If a sheriff fails, in any particular, to do his duty, he is responsible on his official bond, as if he neglects to serve a writ of replevin placed in his hands. It is no excuse that he was deceived or put off by the defendant or the one having the property in possession. It is his place to obey his writ.⁶ If one of the sureties is responsible when taken, it is sufficient, though others are not respon-

¹ *Clinton v. King*, 3 How. Pr. (N. Y.) 55.

² *Krueger v. Pierce*, 37 Wis. 269.

³ *People, &c., v. Core*, 85 Ill. 248.

⁴ *Evans v. Brander*, 2 H. Bla. 557; *Jeffrey v. Bastard*, 4 Ad. & E. 823.

⁵ *Rex v. Lewis*, 2 Term R. 617; *Twelles v. Coldville*, Willes, 375.

⁶ *Hinman v. Borden*, 10 Wend. 367. For a full discussion on this matter, see this title in Mayne's Law of Damage, and for a contrary rule, see *Stinson v. Farnham*, 1 Moaks (Eng.), 60; but this contrary rule is not to be commended. *Fletcher v. Lee*, 65 Mich. 557 (32 N. W. 817); *Wilkins v. Dingley*, 29 Me. 73; *Bispham v. Taylor*, 2 McLean, 355; *State v. Boisliniere*, 40 Mo. 566; *Commonwealth v. Rees*, 3 Whart. (Pa.) 124.

sible.¹ The taking of an assignment of the bond from the sheriff is no waiver of the right to subsequently proceed against him for taking insufficient security, and a return of *nulla bona* to an execution on such a judgment is not conclusive upon the sheriff, as he may still show that the bond was responsible when given,² but the suit against the sheriff is suspended, pending the suit on the bond.³

§ 639. **Measure of damage where officer has lost the replevin bond** is the same as if he had taken no bond, and defendant may recover from the sheriff his damages up to the amount of the replevin bond, had it been properly taken and returned.* The rule of law in such cases is that the sheriff must put the party in as good position as he would have been, had he done his whole duty, and the damages are to be measured in such a case, not by the amount of the value of the goods or the defendant's interest in them, but the amount which could have been recovered if the breach of duty had not happened.⁵

§ 640. **Should hold property, to allow plaintiff to give bond, a reasonable time.**⁶ In some states the law provides that the officer shall hold the property a reasonable time to allow plaintiff to give a bond. In others the time is not fixed. He should then hold it a reasonable time. If the bond be given, it is his imperative duty to surrender it to plaintiff; if it is not given, it is his duty to surrender it to the party from whom he took it. Under a statute which allows the defendant to give bond and hold the property, it is the duty of the sheriff to hold the property until defendant's sureties justify, unless he chooses to become personally responsible.⁷

¹ Lord v. Bicknell, 35 Me. 35. The statute only required one, but two sureties signed.

² Myers v. Clark, 3 W. & S. (Pa.) 539.

³ Commonwealth v. Rees, 3 Whart. (Pa.) 124; Hallett v. Mountstephen, 2 Dowl. & Ry. 343.

⁴ Perran v. Bevan, 5 B. & C. 284.

⁵ Aireton v. Davis, 9 Bing. 740. See Williams v. Mostyn, 4 Mees. & W. 145; Barker v. Green, 2 Bing. 317.

⁶ Morris v. Baker, 5 Wis. 389.

⁷ Graham v. Wells, 18 How. Pr. (N. Y.) 377.

Where the law allows the defendant to keep the property on giving bond, the sheriff is bound to deliver the property to him when proper bond is given.¹ And he is bound to hold the property a reasonable time for the defendant to give the required bond.² An officer taking property in replevin should retain possession three days (or the statutory time), but if the defendant object to the sufficiency of the sureties on plaintiff's undertaking, and the officer return the property before the expiration of the three days, the defendant can not, after the three days have expired, waive his objections and place himself in the position he was before the return.³ The officer should return the property to the defendant unless proper bond be given within a reasonable time. When this is done, the replevin action is at an end. If it proceeds further, it is as a suit in damages by virtue of a special statute.⁴ The court can not shorten the statutory time given plaintiff in replevin to give security.⁵

§ 641. **Sheriff does not have to prepare bond.** It is the duty of the plaintiff to prepare and tender to the sheriff a proper bond. The sheriff's duty is only to pass upon the bond when tendered him, and perform the acts imposed upon him by statute, if he deems the bond sufficient.⁶ And the plaintiff has done his duty when he delivers a good and sufficient bond to the sheriff. He does not have to file it in court.⁷

§ 642. **Must use good judgment in serving the writ.** While the sheriff is protected in serving a writ of replevin, he is expected to use ordinary judgment in the performance of his duty, and not go outside of the plain command of his writ. He is not protected in taking property not described

¹ *Grant v. Booth*, 21 How. Pr. (N. Y.) 354.

² *Hocker v. Stricker*, 1 Dall. 225, 245.

³ *Vanderburgh v. Bassett*, 4 Minn. 242.

⁴ *Morris v. Baker*, 5 Wis. 389.

⁵ *Shaw v. Webster*, 21 Wis. 129.

⁶ *State v. Stevens*, 14 Ark. 266.

⁷ *Smith v. Whiting*, 97 Mass. 317.

in his writ, or in taking property on a writ issued by a court having no jurisdiction to issue it. Neither does the writ protect him in a willful trespass any more than a writ of execution or attachment would.¹ An order of delivery directing the officer to replevy bales of cotton gives him no authority to seize seed cotton.² The sheriff would be justified in refusing to obey a writ of replevin issued for a coffin and contents (a body) buried in the graveyard.³ A sheriff is not protected in taking property under a replevin writ when the court had no jurisdiction to issue the same.⁴ This does not mean that he shall pass a judicial judgment on the powers of the court, but he is presumed to know the law of his state, and if the writ purports to emanate from a court not having jurisdiction to issue it, he is not bound to obey it, and would be liable for any damage resulting from his attempt to do so. The duty and liability of a sheriff with a replevin writ in his hands is the same as in case of any other writ.⁵

§ 643. **Must also see that the writ is regular on its face.** It is the duty of an officer when a writ of replevin is placed in his hands, before he serves it, not only to see that it issues from a court having jurisdiction, as we have just seen, but also to see that it is in due and regular form. If there is apparent on its face a defect which would render it

¹ *Stewart v. Wells*, 6 Barb. 79; *Caldwell v. Arnold*, 8 Minn. 265; *Bradley v. Halloway*, 28 Mo. 150; *Brown v. Bissett*, 1 Zab. 21 (N. J. L.) 268; *Phillips v. Harris*, 3 J. J. Marsh (Ky.), 121; *Isley v. Stubbs*, 5 Mass. 280; *Buck v. Colbath*, 3 Wall. (U. S.) 334; *Hall v. Tuttle*, 2 Wend. 476; *Allen v. Crary*, 10 Wend. 349; *Shipman v. Clark*, 4 Denio, 447; *Ralston v. Black*, 15 Iowa, 47; *Ackworth v. Kemp*, Doug. (Eng.) 40; *Driscoll v. Place*, 44 Vt. 258; *Vail v. Lewis*, 4 Johns. 450. See also *Wise v. Withers*, 3 Cranch (U. S.), 331; *Brown v. Compton*, 8 Term R. 424; *Dynes v. Hoover*, 20 How. 65; *Davison v. Gill*, 1 East. 64.

² *Chandler v. Smith*, 34 Ark. 527.

³ *Guthrie v. Weaver*, 1 Mo. App. 136.

⁴ *Driscoll v. Place*, 44 Vt. 252.

⁵ *Sprague v. Birchard*, 1 Wis. 457; *Grace v. Mitchell*, 31 Wis. 539; *Brown v. Bissett*, 1 Zab. 21 (N. J.) 46; *DeWitt v. Morris*, 13 Wend. 495; *Hay v. Hayes*, 56 Ill. 343; *Morgan v. Evans*, 72 Ill. 586; *Bacon v. Cropsey*, 3 Seld. 195; *Colt v. Eves*, 12 Conn. 243.

void, as that it was not signed, he would be liable for all damage to the defendant if he were to attempt to execute it.¹ He is not justified or protected in executing process void on its face.²

§ 644. **Officer protected from trespass suit in service of.** A replevin process issued by competent authority, and regular and valid upon its face, is a protection against an action of trespass for all acts legitimately done under it. It makes no difference that the process is fraudulently or maliciously procured and used. The remedy in such a case is by an action of trespass on the case. No person can become a trespasser by acting under the regular process of a court, and this rule would hold even if the property was taken from some one other than the defendant named in the writ.³

§ 645. **And trover will not lie against the officer** so long as the suit in replevin is pending and the goods are in the custody of the law.⁴ Lord Holt once said, "The writ of "replevin is a perfect protection to the officer, though he take "the chattels from a stranger to the writ, who is in fact the "owner."⁵ And this rule is affirmed and followed in the later cases.⁶ A constable charged with the execution of a

¹ *Dame v. Fales*, 3 N. H. 70.

² *Leadbetter v. Kendall*, Hempst. (U. S. C. C.) 302; *Dynes v. Hoover*, 20 How. (U. S.) 65; *Wise v. Withers*, 3 Cranch (U. S.), 331; *Brown v. Compton*, 8 Term R. 424 and 231. In California the affidavit order endorsed thereon and undertaking filed therewith all go into the hands of the officer, and constitute the process. He must determine whether they are regular and sufficient at his peril. *Laughlin v. Thompson*, 76 Cal. 287.

³ *Cannon v. Sipples*, 39 Conn. 505; *Watson v. Watson*, 9 Conn. 140; *Osgood v. Carver*, 43 Conn. 24; *Luddington v. Peck*, 2 Conn. 700; *Hayden v. Shed*, 11 Mass. 500; 1 Chit. on Plead., 136, 187; 3 Stark Ev. 1446; 1 Archb. Law of *Nisi Prius*, 405, and cases cited; *Belk v. Broadbent*, 3 T. R. 183; *Clark v. Norton*, 6 Minn. 412; *Waddy Thompson ex parte*, 15 Am. Law Reg. 522.

⁴ *Osgood v. Carver*, 43 Conn. 24.

⁵ *Hallet v. Byrt*, Carthew, 380; *Foster v. Pettibone*, 20 Barb. 350; *Willard v. Kimball*, 10 Allen, 211; *Weiner v. Van Rensselaer*, 43 N. J. L. 547.

⁶ *Boyden v. Frank*, 20 Ill. App. (Bradw.) 169.

possessory warrant, duly issued against specific property, has no discretion but to execute it, and whilst he holds possession lawfully, under such warrant, he is not liable to be sued in trover or other form of action; his possession is that of the court.¹ The officer is afforded a definite protection so long as he keeps within his powers under the writ, but if he go outside of his duty, he is in no wise protected, but acts at his peril.² His protection does not depend in any manner upon the result of the suit.³

§ 646. **The writ is no protection to the plaintiff.** The plaintiff, who has procured the writ to issue, stands on very different grounds from the officer. The officer is a stranger to the proceedings, except as he has official connection with it, and is only responsible for a neglect of an official duty. The plaintiff, on the other hand, must know all the facts at his peril, and is liable for any damage occasioned by the proceeding, if wrongfully commenced, and the writ is no shield to him,⁴ while an officer with a valid replevin writ is probably protected in seizing the property described by his writ, wherever found. Where the plaintiff actively assists in the caption he is liable, as a trespasser, to third parties who own the property so taken, even though he is a servant of the officer.⁵ The plaintiff in a replevin suit is jointly liable with the officer serving the writ, under his directions, for a trespass committed in executing the process.⁶

§ 647. **May break and enter to serve the writ.** There are few decisions as to the power of an officer with a writ of replevin. It was formerly *held* that "where the king is a

¹ Chipstead v. Porter, 63 Ga. 220; Buck v. Colbath, 3 Wall. 334.

² Whitney v. Jenkinson, 3 Wis. 408.

³ Willard v. Kimball, 10 Allen (Mass.), 211; Weinberg v. Conover, 4 Wis. 803; Shipman v. Clark, 4 Denio, 446; Watkins v. Page, 2 Wis. 97; Foster v. Pettibone, 20 Barb. 350; Stimpson v. Reynolds, 14 Barb. 506.

⁴ *Ex parte* Waddy Thompson, 15 Am. Law Reg. 522.

⁵ Williams v. Bunker, 78 Me. 5 Atl. 882.

⁶ Dowell v. Taylor, 2 Mo. App. 329; Perrin v. Claffin, 11 Mo. 15; Canifax v. Chapman, 7 Mo. 175; Murphy v. Wilson, 44 Mo. 313.

"party, the sheriff, if the doors be not open, may break the "party's house, either to arrest him or to do other execution "of the process, if otherwise he cannot enter. When the "door is open, the sheriff may enter the house and do execution at the suit of any subject, either of the body or of "the goods. But the sheriff cannot, on request made and "denial, at the suit of a common person, break the defendant's house to execute any process at the suit of any subject."¹ As the holding and secreting of another man's goods was looked upon as little better than robbery, the English courts were loth to allow the writ to be defeated by the claim that the officer could not break and search for the goods where it was reasonably certain they were concealed, and the statute of Westminster, 1, Ch. 17, expressly authorized the officer, with a writ of replevin, to break and enter a house or *close* to make replevy of goods therein, and this rule has been generally followed since. A man's house is not a castle, nor does it carry any privilege but for himself, his family, and property. It will not protect the goods of another brought there to avoid the service of a legal writ.² "It would be strange if the defendant, by secreting the "goods, and thus adding to the wrongful taking, could have "an action against the sheriff in coming to search for what "he has good reason to suppose could be found there." It has been held that an officer had a right to enter a defendant's house to search for goods described in a writ of replevin, and that the legality of his entry did not depend upon his finding the goods therein, and that he could take with him persons to point out the goods.³ But whatever may be the law as to his right to break and enter in order to execute a writ of replevin, if he enter and make search by permission of the owner or his wife, he will not be liable in

¹ Seamayne's Case, 5 Coke Rep. 91.

² Harlow's Sheriffs, § 45; Murfree on Sheriffs, 971.

³ Kneas v. Fidler, 2 S. & R. (Pa.) 263. See McGee v. Given, 4 Blackf. 18, note; Haggerty v. Wilbur, 16 Johns. 287; State v. Smith, 1 N. H. 346 and note.

damages unless he do unnecessary injury in the search; and if he searches property of a stranger found in the house, upon invitation of the stranger and under a *bona fide* impression that it is the property of the defendant, the same rule of liability will apply. If he injures the property without willfulness or malice, he will be liable for actual damage only. If the plaintiff in the writ accompany and assist the officer, the same rule will apply to him.¹ Under a writ of replevin an officer has a right to break and enter a building in which the property described in his writ is.² It is the duty of the officer to employ sufficient force to execute properly the command of the writ held by him.³

§ 648. **Sheriff should make his authority known.** While all parties are bound to know the sheriff, and probably, too, his regular deputies, they are not bound to know by what process he demands the property. He should state by what process he claims the property. If he be a specially authorized officer, he is also bound to exhibit the authority by which he acts if it is called in question.⁴ Where a sheriff, as defendant in replevin, seeks to justify the taking by the act of his deputy on a writ of attachment, he must aver and prove, first, his official character and authority to appoint a deputy; second, from what court the writ issued; third, that the writ was regular, with the required affidavit attached.⁵

§ 649. **Officer can not take property from the person** of the defendant under a replevin writ, even if worn for the

¹ Bruce v. Ulery, 79 Mo. 322. See on the general subject of liability of officers, Burton v. Fulton, 49 Pa. St. 151; Franz v. Hilterbrand, 45 Mo. 121; Engle v. Jones, 51 Mo. 316; Seibel v. Siemon, 72 Mo. 526; Morgan v. Durfee, 69 Mo. 469.

² Howe v. Oyer, 50 Hun. (N. Y.) 559. See Keith v. Johnson, 1 Dana (Ky.), 604 (25 Am. Dec. 167).

³ Fulton v. Heaton, 1 Barb. (N. Y.) 552; Young v. Wise, 7 Wis. 128; McLean v. Cook, 23 Wis. 365; Ela v. Shepard, 32 N. H. 277; Earl v. Camp, 16 Wend. 563; Bogert v. Phelps, 14 Wis. 88.

⁴ Burton v. Wilkinson, 18 Vt. 186; Alexander v. Burnham, 18 Wis. 200; State ex rel., &c., v. Williams, 5 Wis. 308.

⁵ McCarty v. Gage, 3 Wis. 404.

purpose of preventing the seizure under the writ. A watch, ring, or clothing, while actually worn on the person, cannot be replevied.¹

§ 650. **May sever articles attached to real estate.** The sheriff is not justified in taking real property under the writ, as it is for the delivery of personal property only. It is sometimes a difficult matter in the case of property, as houses, fences, etc., which are personal or real property according to circumstances, to execute the writ without more or less injury to the realty. The sheriff would certainly be liable for any wanton injury to the real estate, but it is not his duty to decide what is or is not real estate, and if his writ commands him to take a certain house or other property which rests upon or is attached to real estate, it is his duty to sever and take it. He has nothing to do with the claim of the defendant that it is real estate, and therefore not repleviable.²

§ 651. **A replevin writ cannot be executed on Sunday,** and where the sheriff personally served the defendant on Saturday night, but could not find the property, but did find and take it on Sunday, and the defendant forcibly on same day retook it from the sheriff's keeper, *held*, that he was not liable criminally.³ And it cannot be made returnable on Sunday; but this defect is waived if the defendant appears and pleads to the merits and goes to trial.⁴

§ 652. **Sheriff may take the property named in his writ when found in a stranger's hands.** A writ of replevin differs from other writs in that it leaves no discretion in the

¹ *Maxam v. Day*, 16 Gray, 213. On general principle, see *Sunbolp v. Alford*, 3 Mees. & W. 249; *Gorton v. Falkner*, 4 D. & East. 305 & 565; *Storey v. Robinson*, 6 Term R. 73 & 139; *Mack v. Parks*, 8 Gray (Mass.), 517.

² Consult *Roberts v. The Dauphin Bank*, 19 Pa. St. 75; *Bowen v. Tallman*, 5 S. & R. (Pa.) 560; *Hamilton v. Stewart*, 59 Ill. 331; *Ricketts v. Dorrel*, 55 Ind. 470; *Elliott v. Black*, 45 Mo. 374.

³ *Bryant v. The State*, 16 Neb. 651 (21 N. W. 406). See *Peirce v. Hill*, 9 Porter (Ala.), 151; *Allen v. Crary*, 10 Wend. 349.

⁴ *Pierce v. Rehfuess*, 35 Mich. 53.

officer, but commands the officer to take certain property therein described and to summon a certain person, etc. Under such a writ he has no discretion, but must seize the property, no matter in whose possession he finds it, and his writ is a complete protection to him.¹ A writ of replevin differs from a writ of execution or attachment in that the officer is commanded to take specific goods, and it has been *held* that he was not liable if he took the goods described in his writ.² An officer is not liable on his official bond if he seizes the property described in the writ of replevin. The writ of replevin differs from the writ of attachment in that it commands the officer to seize specific property without regard to its ownership.³ An officer is not liable in tort if he takes the goods of A on a writ of replevin against B, for the reason that "the command of the writ is express, and points "to specific chattels."⁴ In Wisconsin a laborer may bring an attachment to enforce a lien for labor, and the officer under this special attachment proceeding is commanded to

¹ *Hallett v. Byrt*, Carth. 380; *Shipman v. Clark*, 4 Denio, 447; *Watkins v. Page*, 2 Wis. 97; *Spencer v. McGowan*, 13 Wend. 256; *Foster v. Pettibone*, 20 Barb. 350; *Battis v. Hamlin*, 22 Wis. 669; *Shaw v. Coster*, 8 Paige (N. Y.), 344; *Silisbury v. McCoon*, 4 Denio, 332; *Griffith v. Smith*, 22 Wis. 647; *King v. Orser*, 4 Duer. 436.

² *Hallett v. Byrt*, Carthew, 380; *Foster v. Pettibone*, 20 Barb. 350; *Shipman v. Clark*, 4 Denio, 446. See *Miller v. Davis*, 1 Comyn. 590; *Savacool v. Boughton*, 5 Wend. 170; *Sheldon v. Van Buskirk*, 2 Coms. 473; *Boyden v. Frank*, 20 Ill. App. (Bradw.) 169.

³ *Phillips v. Spotts*, 14 Neb. 139 (15 N. W. 332). This overrules *State v. Jennings*, 4 Ohio St. 418; *Watson v. Watson*, 9 Conn. 14; *Buck v. Colbath*, 3 Wallace, 334.

⁴ *Foster v. Pettibone*, 20 Barb. 350. This doctrine was, however, questioned in *Sampson v. Reynolds*, 14 Barb. 506, and in *Allen v. Carey*, 10 Wend. 349 it was conceded that trespass would lie against an officer in such a case. See also *Skilton v. Winslow*, 4 Grey, 441; 2 Greenl. Ev. 496-7. The conclusion arrived at in these cases depends on the statute and the wording of the writ. If it is a specific command to take certain property, the officer is protected if he take that property, but if the writ command him to take the property from A, he is not protected in taking it from B, or if it command him to take certain property, the property of A, he is not protected if he take the property of B.

seize specific property as in replevin. In such a case it was held that the officer was protected in seizing this property, and it could not be taken from him in replevin.¹

§ 653. **The contrary doctrine has been held**, but on examination of the statutes it will be found, in states following the contrary rule, the writ of replevin commands the officer to take the property described "*from the defendant*," or take the property "*alleged to be in the possession of the defendant*." Seizure in replevin must be from the actual or constructive possession of the defendant. A writ of replevin will not protect an officer in taking the property described from some person besides the defendant, owning and holding it in good faith.² Where the writ of replevin commands the officer to take the property named from the defendant, it has been held that he was not protected if he took it from a stranger in whose hands he found it. This is the rule in New York, under the code. Where, however, the actual possession remains in the defendant, although there has been a transfer of title and a constructive change of possession, the process is a protection.³ It is no protection when he takes them from another than the defendant he is commanded to take them from, in an action of trespass brought against him. The writ in claim and delivery only authorizes the taking from the defendant named in the writ, or his agent, and not from a stranger. The fact that the owner is a married woman, and that the defendant is her husband and agent,

¹ Union Lumber Company v. Transon, 36 Wis. 129; Griffith v. Smith, 22 Wis. 647; Battis v. Hamlin, 22 Wis. 669. See also Watson v. Watson, 9 Conn. 140.

² Sexton v. McDowd, 38 Mich. 148; Billings v. Thomas, 114 Mass. 570; State v. Jennings, 4 Ohio St. 418. This case was considered and overruled by the supreme court of Nebraska on a similar statute. Phillips v. Spotts, 14 Neb. 139 (15 N. W. 332); Stimpson v. Reynold, 14 Barb. 506; Bulis v. Montgomery, 50 N. Y. 353; Otis v. Williams, 70 N. Y. 208. These New York cases were decided upon a special statute, prior to the passage of which a different rule prevailed. See King v. Orser, 4 Duer. 436; Foster v. Pettibone, 20 Barb. 350; Shipman v. Clark, 4 Denio, 446.

³ Bullis v. Montgomery, 50 N. Y. 352; Nichols v. Michael, 23 N. Y. 269; King v. Orser, 4 Duer. 431.

does not affect the legal status of such owner.¹ In the same court it has been *held* under a writ of return, commanding the officer to take the property from the plaintiff in the action or in whosoever hands the same might be, etc., and deliver it to defendant, that the officer was liable for not taking it from a stranger who had it in his possession under a claim of right.² In the absence of a special statute, the doctrine laid down in the preceding section will prevail.

§ 654. **The officer in all cases should use a sound discretion.** If the property is really the defendant's, and has only recently been placed in a stranger's hands for the purpose of fraud or defeating the writ, he should seize it. If, on the other hand, it has been in the hands of the stranger for a long time, and he claims it as owner and in his own right, he might be justified in refusing to dispossess a party not named in his writ, or at least in requiring a bond to indemnify him against a damage suit by this stranger, but much necessarily depends upon the decisions upon the particular statute under which the case arises.³

§ 655. **Defendant does not have to assist the officer.** We know of no law making it the duty of a defendant, in an action of replevin, to assist the officer in the execution of his process. It is the officer's duty to take the property. If it is already in the custody of another officer under an execution, the court has no power to make him surrender it to be taken under the writ of replevin.⁴ But where the defendant is an officer holding under another writ, if the replevin writ is one that he would feel under obligations to serve had it

¹ *Otis v. Williams*, 70 N. Y. 208. But this is wholly by reason of their statute, the writ commanding the officer to seize property alleged to be in the possession of a person named therein. *Manning v. Keenan*, 73 N. Y. 57.

² *Hoffman v. Conner*, 76 N. Y. 121.

³ *Ramsdell v. Buswell*, 54 Me. 546; *Crosby v. Baker*, 6 Allen (Mass.), 295; *Jansen v. Acker*, 23 Wend. 480; *Commonwealth v. Kennard*, 8 Pick. 133; *Brush v. Fowler*, 36 Ill. 59; *Perkins v. Thornberg*, 10 Cal. 189; *Willard v. Kimball*, 10 Allen, 201.

⁴ *Horr v. The People*, 95 Ill. 169.

been placed in his hands, he should surrender the property to the officer holding it and let the law take its course, although his refusal to do so would not make him a trespasser in the taking. It is outside of his official duty to secrete or hide the property, and he would be liable for any damages resulting from such a course.¹

§ 656. **Power of court to compel defendant to surrender property.** The court from which a writ of replevin issues has no power, in case the officer fails to find the property therein described, to compel the defendant to surrender the property. If the property is taken by the officer on the writ, and the defendant afterwards interferes with its possession or control, or forcibly takes the same from the officer or the plaintiff, the court may cause its return or punish for contempt. Or if a defendant in replevin should impede or obstruct in any manner the process of the court, issued to secure property, or prevent the officer from executing the same, he would probably be guilty of contempt. It is the imperative duty of the officer holding a writ of replevin to execute the same by seizing the property therein named wherever he can find the same, whether the defendant is disposed to give it up or not.²

§ 657. **Secreting or driving property away is not contempt.** A person who, by waving of hands and noise, prevents an officer from seizing colts for which he has a writ of replevin, and who, after the officer leaves, secretes them so that the officer can not find them, is not guilty of resisting an officer.³ A peculiar case arose in Nebraska, where a sheriff served the defendant Saturday evening, but could not find the property called for by his writ—horses—but did find them the next day, Sunday, and took them and placed them in a livery stable, from which on the same day defendant forcibly removed them. He was arrested for resisting and impeding

¹ Walker v. Hampton, 8 Ala. 412; Cole v. Conoly, 16 Ala. 271. Six Carpenters' Case, 8 Co. Rep.

² Yott v. The People, 91 Ill. 11.

³ State v. Welch, 37 Wis. 196.

an officer in the discharge of his duty. The court held that it was not the sheriff's duty to take goods on Sunday under a writ of replevin, and released the defendant.¹ But in a late case it was held that an attachment for contempt would issue where defendant had prevented the seizure of the property, and this should be the law everywhere.²

§ 658. **Should make return to the court issuing the writ.** As we have seen, at first the sheriff did not return the writ to the court, but it is now required that he return the writ with a written statement of what he has done under it endorsed thereon, and of any bond taken by him. The statute usually gives him a certain time in which to make his return, and he cannot be compelled to return the writ before the expiration of that time, but it was not intended that he take the full time unless necessary. If an officer take property under a replevin writ, and does not make a return of the writ with bond into court, he is liable as a trespasser, and cannot justify on the ground that one aiding him was the general owner.³ The return is usually written on the back of the writ, and should state concisely all the officer has done under it, and refer to and make a part of his return any bond or receipt taken for the property and show what has been done with the property. The return of the writ should be made by the officer to the court whence it issued, according to the command thereof. If he fail to so return it, he is a trespasser, and liable in trover for the conversion of the property. He cannot justify under a writ of replevin which he has not thus returned, and it is no excuse that it has been the practice of officers, sanctioned by long usage, to return writs to the attorney of the plaintiff, which usage he followed.⁴ The sheriff is required to return the bond

¹ *Bryant v. The State*, 16 Neb. 651 (21 N. W. 406).

² *In re Farr* (Kan.) 21 P. 273.

³ *Adams v. McGlinchy*, 66 Me. 474.

⁴ *Wright v. Marvin*, 59 Vt. 437 (9 A. 601). See on the general subject of justification, *Ellis v. Cleveland*, 54 Vt. 437; *Briggs v. Mason*, 31 Vt. 433; *Munroe v. Merrill*, 6 Gray, 238; *Williams v. Babbitt*, 14 Gray,

taken by him to the court with his return of the writ, that it may be kept with the other papers in the case, and be subject to the inspection of the defendant, who has a vital interest in it. On its return he may inspect it and object to its form or sufficiency or the solvency of the sureties.¹ In Virginia the bond in replevin for property distrained must be returned to the court to which the officer levying the distress belongs, or to the court of that county to which the land belongs. But this is contrary to the general rule, and is a statutory requirement.²

§ 659. **The return should be made full and complete and without delay.** The officer is responsible to the court for the correct exercise of the powers conferred on him by the process of the court, and he should at the earliest practicable moment make to the court a full, clear, and concise statement of all his doings under the writ. If only a part of the property has been taken, the return must show what part,³ and should give an itemized statement of all costs incurred from the time the writ came to his hand. They thus become part of the record in the case.⁴

§ 660. **An officer's return is a part of the record,** and after judgment disposing of the property he cannot change it. A replevin writ may be served by one deputy sheriff on another.⁵ Although a sheriff's return fails to show a taking of the property after a judgment of return, it will be presumed that it was taken according to the command of the writ.⁶

141; *Russ v. Butterfield*, 6 Cush. 242; *Shorlan v. Govett*, 5 B. & C. 485.

¹ *Allen v. Judson*, 71 N. Y. 77; *Petrie v. Fisher*, 43 Ill. 443; *Nunn v. Goodlett*, 5 Eng. (Ark.) 100.

² *Ferguson v. Moor*, 2 Wash. (Va.) 54.

³ *Hutchinson v. McClellan*, 2 Wis. 17; *Mattingly v. Crowley*, 42 Ill. 300; *Pool v. Loomis*, 5 Ark. 110; *Miller v. Moses*, 56 Me. 134; *Nashville v. Alexander*, 10 Humph. (Tenn.) 378.

⁴ *Young v. Atwood*, 5 Hun. (N. Y.) 234.

⁵ *Tuck v. Moses*, 58 Me. 461.

⁶ *Blair v. Ray*, 103 Ill. 615.

§ 661. **The return is conclusive between the parties** on all matters required to be shown by it, and cannot be contradicted or avoided in the suit for the purpose of defeating any rights which have been acquired on the strength of it. In other words, it is protected the same as any other official record.¹ As between the parties, the officer's return that he took the goods out of the defendant's possession is conclusive.² If the officer make his return show facts not required by law, such facts may be controverted.³ The return must be read and construed in connection with the writ upon which it is based.⁴

§ 662. **Return cannot be impeached by statements of sheriff.** It is not permissible for the plaintiff to prove the declarations made by the sheriff to contradict his return as to the time the writ of replevin was levied.⁵

§ 663. **The return may be amended** if it do not correctly state the facts, and the officer should always amend his return if it is incorrect in any particular. A sheriff's return to a writ of replevin may be amended on due notice and a proper showing, but if not amended it is conclusive as made. And where the return certifies that plaintiff had not filed a bond, it is conclusive upon all parties that no bond was given.⁶ The return should show the doings of the officer under the writ—the taking of the property, the appraisalment, the service on defendant—and where the return is defective the writ will be dismissed on motion, but the return may be amended in accordance with the fact, even after a ruling on the motion to dismiss.⁷

¹ *Cornell v. Cook*, 7 Cow. (N. Y.) 310; *Pardee v. Robertson*, 6 Hill (N. Y.), 550; *Messer v. Bailey*, 11 Fost. (N. H.) 9; *Knowles v. Lord*, 4 Whart. (Pa.) 500.

² *Sams v. Armstrong*, 8 Mo. App. 573.

³ *Brown v. Davis*, 9 N. H. 76; *Augier v. Ash*, 6 Fost. (N. H.) 99; *Lewis v. Blair*, 1 N. H. 69; *Evans v. Parker*, 20 Wend. 622; *Browning v. Hanford*, 5 Denio, 586.

⁴ *Weinberg v. Conover*, 4 Wis. 803.

⁵ *Glenn v. Brush*, 3 Col. 26.

⁶ *Green v. Kindy*, 43 Mich. 279 (5 N. W. 297).

⁷ *Bent v. Bent*, 43 Vt. 42. See *Miller v. Cushman*, 38 Vt. 593.

§ 664. If served on defendant, but not on the property, the action proceeds as in damages. The failure of a sheriff to return the value of property replevied is no cause for quashing the writ.¹ Where no bond has been given, and the property not delivered to the plaintiff, it is error to quash the writ and render judgment for a return. The writ is good as a citation, and the cause should progress.² Where defendant in replevin is personally served, but nothing is taken on the writ, the action becomes merely personal—substantially a case of trover—and by appearing and joining issue, and allowing the case to be adjourned from time to time, he waives the right to have the writ set aside for defects in the affidavit and bond.³ Where in justice court the defendant gave the officer a redelivery bond, and kept the property, but it afterward developed that the officer had seized the wrong property entirely, *held*, that the action could proceed as one for damages, but the costs of the wrongful seizure and redelivery bond should be taxed to plaintiff.⁴

¹ Fryer v. Fryer, 6 Dana (Ky.), 54; Huckell v. McCoy, 38 Kan. 53 (15 P. 870).

² Greenwade v. Fisher, 5 B. Mon. (Ky.) 167).

³ Clark v. Dunlap, 50 Mich. 492 (15 N. W. 565).

⁴ Babcock v. Ashmead, 24 Kan. 585.

CHAPTER XXV.

THE BOND, ITS IMPORTANCE AND CONDITIONS.

	Section.		Section.
Importance of the bond	665	Time allowed in which to execute bond—How computed	684
Replevin cannot be prosecuted <i>forma pauperis</i>	666	Ordinarily bond should run to the defendant	685
Wealth of the plaintiff does not excuse from giving bond	667	Liability of sheriff for not taking proper bond	686
The bond is not necessary to the trial	668	Amount of bond, how fixed	687
Bond at common law, its conditions	669	Sheriff responsible for undervaluation or improper bond	688
Essential requisites of statutory bond	670	If bond good when taken, it is sufficient	689
The several conditions are separate and independent of each other	671	Officer is not responsible if the parties agree on a keeper	690
Its conditions are fixed by statute	672	Practice where bond is given before writ issues	691
May be good though it does not conform to the statute	673	Exact form or name of bond not material	692
Bond in replevin under special acts	674	A good bond necessary to valid service	693
Statutory bond is indispensable	675	Where sufficiency of bond must be excepted to	694
The object of requiring a bond	676	Objection, how made—Must be before trial	695
Court may require a statutory bond	677	Bond is not void for mere technical defects	696
Court cannot interfere with the discretion allowed the sheriff	678	The court should allow bond to be amended	697
The officer is the exclusive judge of the sufficiency of the bond in the first instance	679	Replevin bond may be amended	698
Court may permit new bond, that surety may testify	680	When bond invalid—Illustrations	699
What is proper execution	681	Ordinary bond does not take the place of security for costs	700
The same—Execution	682	Giving re-delivery bond waives what defenses	701
Bond need not be under seal	683	Effect of bond on title	702
		Does not give plaintiff a new title	703

§ 665. **Importance of the bond.** Next to the affidavit, the bond is the most important matter in a replevin action. It is usually provided by statute that the bond shall be in double the value of the property, as found by the sheriff's appraisal. In other states the plaintiff must give bond in double the amount alleged by him as the value of the property, and in others the statute provides that the sheriff shall take bond in a sufficient sum, leaving it discretionary as to the amount of the bond he shall take. But in all cases where the property is taken, and its possession changed pending the action, a good and sufficient bond is absolutely necessary to the maintenance of the action. The statute in regard to bond must be complied with strictly. A motion may be made to dismiss an action of replevin because the statutory bond was not given at the proper time.¹ Where the bond is irregular and does not comply with the statute, the officer has no authority to serve the writ.² The taking of a bond by the sheriff from the plaintiff in replevin is a prerequisite to the service of the writ.³ Not taking bond is ground for dismissal.⁴ Defective bond or lack of bond may be presented on motion, and does not have to be pleaded in bar.⁵ To give the court jurisdiction over the property, the proper bond must be given.⁶

§ 666. **Replevin cannot be prosecuted forma pauperis.** But if bond be given for double the value of the property, and the costs accumulate to a larger amount, on a rule for

¹ Claffin v. Thayer, 13 Gray (Mass.), 457.

² Garlin v. Strickland, 27 Me. 443.

³ Graves v. Sittig, 5 Wis. 219; Millikin v. Selye, 6 Hill, 623; Cady v. Eggleston, 11 Mass. 285; Kimball v. True, 34 Me. 84; Pirani v. Barden, 5 Ark. 81; Pool v. Loomis, 5 Ark. 110; Baldwin v. Whittier, 16 Me. 33; Smith v. McFall, 18 Wend. (N. Y.) 521; State v. Stephens, 14 Ark. 264; Luther v. Arnold, 7 Rich. (S. C.) 397; Whitney v. Jenkinson, 3 Wis. 407; Smith v. McFall, 18 Wend. 521.

⁴ Bent v. Bent, 43 Vt. 42.

⁵ Bennett v. Allen, 30 Vt. 684. But see Douglass v. Gardner, 63 Me. 362.

⁶ Dowell v. Richardson, 10 Ind. 573.

further security, the plaintiff may take the pauper's oath, the same as in other forms of action.¹ But if the property is not taken on the writ, bond is not indispensable, and the action may proceed for damages on the filing of proper pauper oath.²

§ 667. **Wealth of the plaintiff does not excuse from giving bond.** On the other hand, the fact that plaintiff is a man of large means and known responsibility furnishes no reason for not giving the bond. The law is no respecter of persons, and its requirements must be complied with by rich and poor.³ A deposit of money will not take the place of bond.⁴

§ 668. **The bond is not necessary to the trial.** It only has to do with the delivery of the property to the claimant. When this point in the case is passed, the bond is used no more until after judgment, when, if the result be adverse to the obligor, and he fails to perform its conditions, it is resorted to by the obligee or party damaged, and again becomes the important paper of the case. Its presence at the trial is not needed; it is no part of the papers of the case so far as the trial is concerned.⁵

§ 669. **Bond at common law—Its conditions.** By the common law prior to the statute of 11 George II., no bond was required, the only security being pledges to prosecute the suit or answer to the king for false clamor.⁶ By that statute, ch. 19, § 23, the sheriff was required to take bond with two securities in double the value of the goods about

¹ *Horton v. Vowel*, 4 Heis (Tenn.), 622; *Kincaid v. Bradshaw*, 6 Bax. (Tenn.) 102.

² *Stone v. Hopkins*, 11 Heis (Tenn.), 190.

³ *Smith v. Trawl*, 1 Root (Conn.), 165; *Harriman v. Wilkins*, 20 Me. 96.

⁴ *Cummings v. Gaun*, 52 Pa. St. 488.

⁵ *Tuck v. Moses*, 58 Me. 463; *Trippe v. Howe*, 45 Vt. 524; *Kesler v. Haynes*, 6 Wend. (N. Y.) 547; *Pirani v. Barden*, 5 Ark. 81.

⁶ 3 Black, 274, 287; *Evans v. Brandner*, 2 H. Black, 547; *Baker v. Phillips*, 4 Johns. 190; *Caldwell v. West*, 1 Zab. (21 N. J.) 420.

to be replevied, conditioned to prosecute the suit with effect and without delay, and to return the goods if return should be awarded. The sheriff was a trespasser if he delivered the goods without proper bond. The code provisions in regard to bond have substantially followed this statute.

§ 670. **Essential requisites of statutory bond.** The bond should correctly describe the suit in which it is given and give the names of the parties, and especially the name of the party from whom the goods are to be taken. An omission in this particular has been held to be fatal.¹ The name of the court and the term are not so necessary, but should be given.² It should state the value of the property, and describe it so that it can be identified. This can sometimes be done in a general way and by referring to the description in the affidavit.³ It must be in a definite sum, which must be stated in money. A bond in "double the value of the "goods about to be replevied" is not sufficient.⁴ If the amount is blank, the bond is void. It must obligate the plaintiff to prosecute his suit without delay. The law will not allow plaintiff by its process to take property claimed by another, and then not try speedily the issue thus tendered.⁵ It must also obligate the plaintiff to prosecute with effect; that is, that if defeated in his action, he will perform the conditions of the bond.⁶ It must bind the plaintiff to perform whatever judgment may be rendered against him by the court, usually to return the property in as good condition as when taken, and pay any judgment rendered against him and costs.

¹ *Arter v. The People*, 54 Ill. 228; *Matthews v. Storms*, 72 Ill. 321.

² *Arnold v. Allen*, 8 Mass. 147; *Graves v. Shoefelt*, 60 Ill. 464; *Branch v. Branch*, 6 Fla. 315; *Chadwick v. Badger*, 9 N. H. 450.

³ *McDermott v. Doyle*, 11 Mo. 443.

⁴ *Bennett v. Allen*, 30 Vt. 684; *Clark v. C. R. R. R.*, 6 Gray, 363; *Case v. Pettee*, 5 Gray, 27.

⁵ *Axford v. Perrett*, 4 Bing. 486; *Daniels v. Patterson*, 3 Comst. (N. Y.) 51.

⁶ *Persse v. Watrous*, 30 Conn. 144; *Humphrey v. Taggart*, 38 Ill. 228.

§ 671. **The several conditions are separate and independent of each other.** Each condition of the bond is an independent obligation, distinct from all the others. A failure to keep any one of these obligations is ground for action on the bond for the full penalty if the damage amount to that, and the fact that the obligors have kept all the other obligations is of no advantage to them.¹ For a full discussion of this subject, see Part III. And it appears to be well settled that one of these conditions may be so defectively stated as to avoid the bond so far as that condition is concerned, yet the bond be valid as to the others, and a suit may be maintained for breach thereof.²

§ 672. **The conditions of the bond are fixed by statute.** Originally they were to prosecute the suit and to satisfy the judgment, if one should be rendered against plaintiff, and such is the form to-day in replevin of a distress for rent. In the ordinary replevin suit, they are to prosecute the suit and make return if return be awarded.³ These two provisions are the main features of the bond in replevin as now used. The bond need not recite the circumstances which give the right to replevy.⁴ But the bond should state that the property was restored to the plaintiff.⁵ Where the amount is not fixed by statute, the bond should be taken in an amount sufficient to secure the return of the goods so taken.⁶

¹ *Clark v. Norton*, 6 Minn. 417; *Hall v. Smith*, 10 Iowa, 47; *Persse v. Watrous*, 30 Conn. 146; *Fullerton v. Miller*, 22 Md. 5; *Pettigrove v. Hoyt*, 2 Fairfield (Me.), 66; *Lambden v. Conoway*, 5 Har. (Del.) 1; *Brown v. Parker*, 5 Blackf. 292; *Sopris v. Lilley*, 2 Col. 498.

² *Berghoff v. Heckwolf*, 26 Mo. 513; *Kimmel v. Kint*, 2 Watts (Pa.), 432; *Gibbs v. Bartlett*, 2 W. & S. (Pa.) 33; *Humphrey v. Taggart*, 38 Ill. 228; *Chaffee v. Sangston*, 10 Watts (Pa.), 266; *United States v. Brown*, Gilpin, C. C., 155; *Erlinger v. The People*, 36 Ill. 458; *Pigot's Case*, 11 Co. Rep. 27; *Badlam v. Tucker*, 1 Pick. 286.

³ *Clark v. Adair*, 3 Harr. (Del.) 113.

⁴ *Meaux v. Rutgers*, Sneed (Ky.), 341.

⁵ *Glassford v. Hackett*, 3 Call. (Va.) 193.

⁶ *Plunkett v. Moore*, 4 Harr. (Del.) 379.

§ 673. **May be good, though it does not conform to the statute.** Although the statute provides the form of the bond, it does not prohibit the taking of the bond in any other form, or declare the bond void, and if the bond be not strictly according to the statutory form it may be good as a common law bond.¹ The party damaged may treat it as a valid bond and recover upon it. The obligor is estopped from pleading its defects as a bar to a recovery.² The bond should be drawn with reference to the facts of the case in which it is given, and should cover all the property taken. Where, in replevin for a cow and calf, the bond is only conditioned for a return of the cow, the suit should be dismissed as to the calf. The plaintiff in such case cannot remedy his mistake by filing a new bond.³ Where only part of the chattels sued for are taken, the bond should be conditioned to return those taken only.⁴

§ 674. **Bond in replevin under special acts.** The bond must conform strictly to the statutory requirement of the act under which the action is brought. If it does not do so, it is ground for dismissal, and on dismissal for this cause, the property should be returned to the defendant by order of the court.⁵ A non-resident of Connecticut must give a bond to prosecute his action of replevin, or the prosecution will be abated.⁶

¹ *Claggett v. Richards*, 45 N. H. 360; *Tuck v. Moses*, 54 Me. 115; *Livingston v. Superior Court*, 10 Wend. 547; *Bell v. Thomas*, 8 Ala. 527; *Lambden v. Conowa*, 5 Har. (Del.) 1; *Florrance v. Goodin*, 5 B. Mon. (Ky.) 111; *Barry v. Sinclair*, Phill. (N. C.) 7; *Persse v. Watrous*, 30 Conn. 140; *Colorado National Bank v. Lester* (Tex.), 11 S. W. 626.

² *Claggett v. Richards*, 45 N. H. 360; *Branch v. Branch*, 6 Fla. 315; *Stansfield v. Hellawell*, 11 E. S. & Eq. 559; *Fahnestock v. Gilham*, 77 Ill. 637; *Jennison v. Haire*, 29 Mich. 209; *Nunn v. Goodlett*, 5 Eng. (Ark.) 100; *Romon v. Stratton*, 2 Bibb. (Ky.) 199; *Stevenson v. Miller*, 2 Litt. Rep. (Ky.) 307; *Morse v. Hodsdon*, 5 Mass. 318.

³ *Eastman v. Barnes*, 58 Vt. 329 (1 A. 569).

⁴ *Weber v. Manne*, 11 N. Y. Civ. Proc. R. 64.

⁵ *Thurber v. Richmond*, 46 Vt. 395.

⁶ *Fleet v. Lockwood*, 17 Conn. 233.

§ 675. **Statutory bond is indispensable before the delivery of the property in all cases.**¹ Where an appraisal is provided for before the bond is given, the sheriff may seize it for the purposes of appraisal only, before the giving of the bond.² Where the sheriff delivers property without bond, the defendant may have the writ abated and the property returned on motion, or he may bring an action against the officer for trespass.³

§ 676. **The object of requiring a bond is that the party who is in possession of goods, and therefore *prima facie* entitled to the custody of them, may have security that he will be reimbursed for their value when they are taken from his possession upon this process by another who claims to own them, but subsequently fails to prove the title in himself. If the bond be insufficient in amount, it may be cured by a new bond or by amendment.**⁴ The replevin bond is as well for the benefit of the party defendant as for the officer.⁵ The object of a replevin bond is not merely to indemnify the sheriff, but also to furnish an additional remedy to the defendant in case the plaintiff fails to maintain his suit.⁶

¹ Dearborn v. Kelley, Allen (Mass.), 426; Armstrong v. Burrell, 12 Wend. 303.

² Smith v. Whiting, 97 Mass. 316; Wolcott v. Mead, 12 Met. (Mass.) 516.

³ Parker v. Hall, 55 Me. 364; Cady v. Eggleston, 11 Mass. 285; Whitney v. Jenkinson, 3 Wis. 408; O'Grady v. Keyes, 1 Allen, (Mass.) 284.

⁴ Briggs v. Wiswell, 56 N. H. 319. The statute provides no way by which the amount of the bond shall be fixed—no appraisal of property—but that the bond shall be in double the value of the property. Where plaintiff valued the property in the writ at \$5,000 and gave bond for \$8,000, *held*, on motion to dismiss for this defect, that he might amend his writ by changing the amount to \$4,000, or he might file an additional bond for \$2,000 or a new bond for \$10,000, and that this value, while an admission against plaintiff, was not conclusive as to the value on the trial.

⁵ Langdoc v. Parkinson, 2 Bradw. (Ill.) 136; Fahnestock v. Gilham, 77 Ill. 637.

⁶ Petrie v. Fisher, 43 Ill. 442; Langdoc v. Parkinson, 2 Bradw. (Ill.) 138; Fahnestock v. Gilham, 77 Ill. 637; Nunn v. Goodlett, 5 Eng. (Ark.)

When in replevin the bond is declared void for defects, the court will order a return of the property to the defendant, and will not hear testimony tending to show that the right of property is in the plaintiff.¹ The object of the bond is to compel plaintiff to prosecute the suit without delay, and if defeated, return the property or indemnify the defendant for all loss occasioned by the wrongful taking.²

§ 677. **Court may require a statutory bond.** And it is in the power of the court to require one with the statutory conditions.³ The bond must be conditioned as required by the statute; otherwise, no right is acquired under the bond.⁴ The right to prosecute an action of replevin, and to take possession of goods upon a mere claim of title, and before trial, is purely a statutory right, and is only to be exercised upon a full compliance with the terms of the statute.⁵ A replevin bond to prosecute a suit in another state is not a replevin bond within the New York statutes.⁶ Bond in replevin for costs does not comply with the statute requiring bond in double the amount, and on a rule for security the suit may be dismissed.⁷

§ 678. **Court cannot interfere with the discretion allowed the sheriff.** Where the statute makes the sheriff the judge of the bond, the court will not interfere with the exercise of his discretion. Where he does not take a statutory bond, he is liable on his official bond. In New York, where the penalty of the bond is in the discretion of the officer, the court will deny a motion to increase the amount of the bond.⁸

100; *Doogan v. Tyson*, 6 Gill. & J. (Md.) 453; *Smith v. Whiting*, 97 Mass. 316.

¹ *Greeley v. Currier*, 39 Me. 516.

² *Badlam v. Tucker*, 1 Pick. 287; *Doogan v. Tyson*, 6 Gill. & J. (Md.) 453; *Belt v. Worthington*, 3 Gill. & J. (Md.) 247.

³ *Treman v. Morris*, 9 Bradw. (Ill.) 237.

⁴ *Barry v. Sinclair*, Phill. (N. C. L.) 7.

⁵ *Bennett v. Allen*, 30 Vt. 684.

⁶ *Livingston v. Superior Court*, 10 Wend. 545.

⁷ *Creamer v. Ford*, 1 Heis (Tenn.), 307.

⁸ *Bulmer v. Jenkins*, 3 How. Pr. 11.

No other bond or undertaking can be required than that taken and approved by the sheriff.¹ A motion to increase the penalty of a replevin bond will not be entertained.²

§ 679. **The officer is the exclusive judge of the sufficiency of the bond in the first instance.** He can require just such a bond as the statutes provide for and none other, but he is the sole judge of the bond, and is responsible on his official bond if he fail in his duty to either party. If he once passes upon the bond, so far as he is concerned his action is final. He is not an insurer of the continued solvency of the parties to the bond, but is responsible for their solvency at the time they sign the bond. He is also responsible for the bond being in the statutory form, and for its being executed in the statutory manner. He should endorse his approval on the bond if satisfied with it, but if he keep the bond and deliver the property it is sufficient. His approval will be presumed. The delivery of the bond to the officer who serves the writ is a sufficient delivery, even if the officer neglect to return it to the court with his writ.³ An officer having served an order in replevin and seized the property as commanded is not bound to accept as sureties on the bond residents of another county.⁴ Where a sheriff justifies the taking of property under a writ of replevin, he must allege the giving of a proper bond for the return of the property.⁵ In New York a surety company can furnish the bond in a replevin case.⁶

§ 680. **Court may permit new bond, that surety on the old may testify.** The bond is under the control of the court, and where the statute makes a signer of the bond incompetent as a witness in the case, the court may permit the plaintiff to file a new replevin bond with other sureties.⁷

¹ DeRequene v. Lewis, 3 Robt. (N. Y.) 708.

² Bulmer v. Jenkins, 3 How. Pr. 11.

³ Smith v. Whiting, 97 Mass. 316.

⁴ State v. Wait, 23 N. W. 166 (36 N. W. 380).

⁵ Morris v. Van Voast, 19 Wend. (N. Y.) 283.

⁶ Bick v. Reese, 52 Hun. 125.

⁷ Kendall v. Fitts, 22 N. H. 1.

§ 681. **What is proper execution.** The form and manner in which bond or undertaking in replevin shall be executed is usually provided by statute. And it is the duty of the officer to see that the statute is complied with. The plaintiff in the action is bound whether he sign the bond or not, so that his name may be signed by his attorney or agent. If one surety only is required, he must be responsible financially, and competent to sign a bond; but where two sureties are given, the decisions have not been quite so strict as to a technical compliance with the law by both. So the bond was sufficient to protect the party from whom the property was taken by its means. The sheriff should approve the bond and return it with his writ.¹ One partner cannot bind his co-partner unless specially authorized to sign the bond.²

§ 682. **The same—Execution by surety only is sufficient in replevin by a church corporation, before a justice of the peace.** Mere informality in bond is not fatal.³ It is sufficient if the bond in replevin is signed by the surety. The plaintiff is liable without any bond.⁴ A bond in replevin for distress is not void because it has more than one surety.⁵ A replevin bond, executed by one of two defendants in a distress, merges the distress warrant, and no further steps can be taken while the bond is in force.⁶ Judgment will not be arrested because there are not two sureties on the bond.⁷ The statute of George III., requiring two sureties on

¹ See *Howe v. Handley*, 28 Me. 241; *Greeley v. Currier*, 39 Me. 516; *Garlen v. Strickland*, 27 Me. 443; *Branch v. Branch*, 6 Fla. 315; *Kinney v. Mallory*, 3 Ala. 626; *Clafin v. Thayer*, 13 Gray (Mass.), 459; *Frei v. Vogel*, 40 Mo. 149; *Hartlep v. Cole* (Ind.), 22 N. E. 130.

² *Butterfield v. Hensley*, 12 Gray, 226.

³ *Phillippi Christian Church v. Harbough*, 64 Ind. 240. Citing *Dear-dorf v. Ulmer*, 34 Ind. 353; *Curch v. Drummond*, 7 Ind. 17; *Abbott v. Zeigler*, 9 Ind. 511.

⁴ *Cooper v. Brown*, 7 Dana (Ky.), 333.

⁵ *Saeltzer v. Ginther*, 2 Miles (Pa.), 87.

⁶ *Miller v. Commonwealth*, 4 B. Mon. (Ky.) 304.

⁷ *DeBow v. Applegate*, 3 McCord (S. C.), 44.

a replevin bond, is not in force in South Carolina.¹ But a bond signed by one of three co-partners, plaintiffs in replevin, "for and in behalf" of himself and his co-partners, and by the proper number of sureties, is good.² Sureties on a replevin bond are not parties to the action in replevin, and have no control over it.³ The bond may be executed by a stranger.⁴ A bond taken in replevin for goods distrained for rent is good if signed by the original lessee, though not the owner of the property distrained.⁵

§ 683. **Ordinarily the bond need not be under seal unless an express statute requires it.**⁶ In Indiana, to be valid, the replevin bond must be under seal.⁷ This was the old common law rule, but has now been generally changed by statute.

§ 684. **Time allowed in which to execute bond—How computed.** Where the statute requires the bond to be executed within twenty-four hours, and the property is taken on Saturday, Sunday is not included in the estimate of time.⁸ And the same rule would doubtless apply as to a legal holiday. A bond executed on Sunday has been held to be void.⁹

§ 685. **Ordinarily bond should run to the defendant.** Formerly it generally run to the officer serving the writ, and in case of a breach was sued in his name for the use of the party damaged, or the sheriff could assign it to the party damaged, when he sued for his interest, (which was the amount of his damage if within the penalty of the bond,) in his own name, but the rule generally followed now is to take

¹ DeBow v. Applegate, 3 McCord (S. C.), 44.

² Dunbar v. Scott, 14 R. I. 152.

³ Lindner v. Brock, 40 Mich. 618.

⁴ Kenney v. Mallory, 3 Ala. 626.

⁵ Ferguson v. Moor, 2 Wash. (Va.) 54.

⁶ State ex rel., etc., v. Dunn, 60 Mo. 64; Henoch v. Chaney, 61 Mo. 129. See Handley v. Hathaway, 4 T. B. Mon. (Ky.) 554.

⁷ Lovejoy v. Bright, 8 Blackf. (Ind.) 206.

⁸ Link v. Clemmens, 7 Blackf. 480.

⁹ Link v. Clemmens, 7 Blackf. 480.

the bond to the defendant direct. But this is a matter usually provided for by statute, and the statute must be complied with. It is not a good objection to a replevin bond that it is made to the plaintiff instead of to the sheriff.¹ A bond to replevy goods taken in attachment is properly made payable to the sheriff.² A statute naming the sheriff as the party to whom a replevin bond shall be given, construed to mean the officer serving the writ, and a bond given to the coroner serving the writ, held valid.³ So a bond in replevin taken to the deputy sheriff in his own name is good, and a substantial compliance with the statute.⁴ Where the statute provides that the bond run to the defendant, and the officer served the writ on a bond running to himself, held, that he was a trespasser.⁵

§ 686. **Liability of sheriff for not taking proper bond.** If the sheriff replevy property without taking bond in a sufficient penalty to protect the defendant in case a return is awarded, he will be liable to the defendant upon his official bond, to the extent of the damages sustained. He must ascertain the value of the property, independently of the affidavit of the plaintiff, and fix the amount of the bond accordingly.⁶ A sheriff who does not take a proper bond in replevin is liable on his official bond.⁷ In taking a bond the officer acts as the agent of the law, and not of a party to the suit; he must know the law and keep within it at his peril.⁸ An officer is liable on his official bond if he take insufficient surety on a replevin bond, and the measure of damages is

¹ Slack v. Heath, 4 E. D. Smith, (N. Y.) 95.

² Adkins v. Allen, 1 Stew. (Ala.) 130; Sartin v. Weir, 3 Stew. & P. (Ala.) 421; Whittemore v. Jones, 5 N. H. 362.

³ Spur v. Skinner, 35 Ill. 282.

⁴ Wheeler v. Wilkins, 19 Mich. 78.

⁵ Purple v. Purple, 5 Pick. 226.

⁶ The People, Use, &c., v. Core, 85 Ill. 248. The statute merely requires the sheriff to take a sufficient bond.

⁷ Hughes v. Newson, 86 N. C. 424; Gallarati v. Orser, 27 N. Y. 324; Governor v. Munroe, 4 Dev. 412.

⁸ Cook v. Frendenthal, 80 N. Y. 202.

not the value of the property replevied, but is the amount plaintiff has lost by reason of the misdoing of the defendant in accepting insufficient sureties.¹ Where nothing appears to the contrary, it will be presumed that the officer took a bond before executing the writ as required by statute.² Where a replevin bond was found among the papers of a deceased clerk, and an execution had been issued thereon, the court presumed that the bond had been taken and filed according to law.³

§ 687. **Amount of bond—How fixed.** The bond should be in double the value of the property. The manner of determining this is a matter of practice and varies in different states. Where the law does not provide for an appraisement, the value placed on the property by the plaintiff in his affidavit is usually taken as a basis.⁴ Where no appraisal is provided for, it is the duty of the sheriff to see that the penalty in the bond is large enough to fully indemnify against any loss, and he is not concluded by the valuation in plaintiff's affidavit.⁵ Under such a system of practice it has been held that the parties could agree to a certain value, and the bond could be based upon the agreed value.⁶

§ 688. **Sheriff is responsible for undervaluation or improper bond.** Under the procedure in most states, the sheriff immediately on taking property in replevin should cause it to be appraised by disinterested persons. This is done to fix the amount of the bond, which is usually in double the amount of the appraised value, and it has been held that

¹ *Carter v. Duggan*, 144 Mass. 32 (10 N. E. 486); *Hofheimer v. Campbell*, 7 Lans. (N. Y.) 157; *People ex rel. Fletcher v. Lee*, 65 Mich. 557 (32 N. W. 817).

² *McGuffie v. Dervine*, 1 Greene (Iowa), 251.

³ *Doe v. Cunningham*, 6 Blackf. (Ind.) 430.

⁴ *Deardorf v. Ulmer*, 34 Ind. 353.

⁵ *People v. Core*, 85 Ill. 248; *Murdock v. Will*, 1 Dall. 341; *Thomas v. Spofford*, 46 Me. 408; *Harriman v. Wilkins*, 20 Me. 93; *Kimball v. True*, 34 Me. 88; *Plunkett v. Moore*, 4 Har. (Del.) 379; *Jeffrey v. Bastard*, 4 Adol. & E. 823; *Roach v. Moulton*, 1 Chand. (Wis.) 187.

⁶ *Wolcott v. Mead*, 12 Met. 516.

he was responsible as a trespasser if he failed to take a bond or allowed the property to be taken on an undervaluation.¹ As the sheriff is liable, there seems to be no reason why, if he were satisfied that the first appraisal was too low, he could not cause another to be made and insist on gauging the bond by that.

§ 689. **If bond good when taken, it is sufficient.** If, however, the sheriff make proper inquiry as to the responsibility of the surety, and has him qualify as to his responsibility, he is not liable for taking insufficient surety. The bond taken should be returned into court, that the plaintiff may move for additional surety, if he see fit. If the sheriff fail to so return a bond taken by him, he is liable on his official bond.² Under the Tennessee law,³ the court is given the power of imprisoning a plaintiff who replevies property to which it is afterward determined he had no right, without giving a good bond. This is held not to apply to one who fails to give a new bond when the first was sufficient at the time it was given, but has since become insufficient through the misfortune of the parties.⁴

§ 690. **Officer is not responsible if parties agree on a keeper.** Where, pending a replevin suit, the parties agree that the property shall be turned over to a third party, to be held to abide the suit, and it is so done, the officer is relieved of all responsibility, and judgment can not be entered against him, except in form.⁵

§ 691. **Practice where bond is given before the writ issues, and is approved by the clerk or court issuing it.** While the general practice is for the officer who has the

¹ Hall v. Monroe, 73 Me. 123; Taylor's Landlord and Tenant, § 740.

² The People, Use, etc., v. Tibbetts, 89 Ill. 159; Robinson v. The People, 8 Bradw. (Ill.) 279; Taylor's Landlord and Tenant, § 741.

³ Code, § 3392.

⁴ Cash v. Quinncnett, 5 Heis (Tenn.), 737. In this case plaintiff took the property and sold it, and suffered judgment for a return to go against him by default, and as an excuse for not satisfying the judgment pleaded the insolvency of himself and sureties.

⁵ Tumble v. Alexander, 53 Cal. 3.

serving of the writ to take and approve the bond, in some states the bond must be first given and approved. The following rulings are under such a practice: In Virginia the omission to give the bond and security, before the issuing of the writ of replevin, does not invalidate the writ, but only subjects the sheriff to an action by the defendant.¹ Where a justice of the peace issued a writ of replevin without the required bond, *held*, that he was liable to the defendant for all damage sustained by him.² In replevin before a justice of the peace, if the bond filed by the plaintiff be for a sum less than double the value of the property as stated in the verified complaint, the justice has no jurisdiction of the action, and it cannot be corrected on appeal.³ Where it is the duty of the clerk to approve the bond before the taking of the property, it will be presumed that he approved the bond if he direct the sheriff to seize the property.⁴ The issuing of a writ of replevin by a justice of the peace, upon the filing of a bond, is a sufficient approval of the bond.⁵

§ 692. **Exact form or name of bond not material.** A bond in replevin before a justice was drawn as an undertaking in replevin in circuit court, instead of being in double the amount of the property, as required by statute. *Held*, that it was sufficient to support the action, and the defect could not be reached by a motion in arrest of judgment on appeal.⁶

§ 693. **A good bond necessary to valid service.** Where the statute requires the bond to be given before service of the writ of replevin, a bond signed by one as agent, without authority of his principal, is no bond, and the service is in-

¹ *Vaiden v. Bell*, 3 Rand. (Va.) 448.

² *Hannum v. Norris*, 21 Kan. 114.

³ *Deardorf v. Ulmer*, 34 Ind. 353.

⁴ *Baker v. Pope*, 49 Ala. 415.

⁵ *Coverdale v. Alexander*, 82 Ind. 503.

⁶ *Bugle v. Meyers*, 59 Ind. 73; *Claggett v. Richards*, 45 N. H. 360; *Tuck v. Moses*, 54 Me. 115; *Persse v. Watrous*, 30 Conn. 140.

valid and cannot be made good by subsequent ratification of the principal, without the consent of the defendant in replevin. Such service will be quashed on defendant's motion.¹

§ 694. **Where sufficiency of bond must be excepted to.** In some places, to make the sheriff liable, the defendant must except or object to the offered signers, when it is the duty of the sheriff to compel them to justify or get others;² and under the New York law of 1839, if the sureties on a replevin bond failed to justify, the defendant is entitled to a discontinuance without excepting to them.³ If the defendant wishes to except to the sureties, he is not obliged to seek the officer, but may file his exceptions in the clerk's office.⁴ A sheriff is only liable where the defendant in replevin has excepted to the sufficiency of the sureties, and they or new sureties have failed to justify.⁵ Where the defendant in replevin excepts to the security in the replevin bond returned by the sheriff, the court cannot sustain the exception and order the plaintiff to file a new bond without proof of the insufficiency of the security.⁶

§ 695. **Objection—How made—Must be before trial.** Where a defendant goes into trial without objecting to the bond because it is not in double the value of the property, the defect is waived.⁷ An objection to a defect apparent upon the face of a replevin bond may be taken either by a motion to dismiss or by an answer in abatement.⁸ The failure to take bond or the taking of an insufficient bond must be taken advantage of at the earliest opportunity, and by neglecting

¹ *Smith v. Fisher*, 13 R. I. 624; *Whiteford v. Goodwin*, 13 R. I. 145; *Garlin v. Strickland*, 27 Me. 443; *Purple v. Purple*, 5 Pick. 226.

² *Wilson v. Williams*, 18 Wend. (N. Y.) 581.

³ *Weed v. Hinton*, 7 Hill (N. Y.), 157.

⁴ *Cusick v. Cohen*, 3 Duer. (N. Y.) 267.

⁵ *Westervelt v. Bell*, 19 Wend. (N. Y.) 531.

⁶ *Dixon v. Thatcher*, 8 Ark. 134.

⁷ *Spencer v. Dickerson*, 15 Ind. 368.

⁸ *Houghton v. Ware*, 113 Mass. 49; *Nye v. Liscomb*, 21 Pick. 263; *Simonds v. Parker*, 1 Met. 508; *Hicks v. Stull*, 11 B. Mon. 53; *Douglass v. Gardner*, 63 Me. 462.

this and pleading the opportunity is lost.¹ It is too late to object after verdict.²

§ 696. **Bond is not void for mere technical defects.** The bond may be good, though in describing the action in which it is taken it does not give the title of the case correctly.³ An irregular bond is valid after judgment.⁴ The bond must be in double the value of the property, but if in excess of that amount, that fact alone does not render it defective.⁵ An undertaking in replevin, otherwise conforming to the statute, and omitting only the clause, "if the property "be delivered to him," is sufficient.⁶ Where the law required the sureties to be resident householders, and only one of them was, though technically defective, if that one is good for the amount, it is sufficient.⁷ It is not ground for dismissing a replevin suit, on appeal in the circuit court, that the bond does not correctly state the date of the writ.⁸ Where the statute provides⁹ that no writ of replevin shall be issued until some person known to be of sufficient responsibility has entered into a recognizance with at least one sufficient surety, *held*, that a joint and several bond is not insuffi-

¹ *Tripp v. Howe*, 45 Vt. 524; *Houghton v. Ware*, 113 Mass. 49; *Tuck v. Moses*, 58 Me. 473; *Spencer v. Dickinson*, 15 Ind. 368; *Claffin v. Thayer*, 13 Gray 459; *Simonds v. Parker*, 1 Met. 508; *Bugle v. Myers*, 59 Ind. 73.

² *Rich v. Ryder*, 105 Mass. 308.

³ *Chadwick v. Badger*, 9 N. H. 450.

⁴ *Kouns v. Bank*, 2 B. Mon. (Ky.) 303; *Clark v. Bell*, 2 Litt. (Ky.) 164.

⁵ *Owen v. Nail*, 6 Term R. 702 and 339; *Freeman v. Davis*, 7 Mass. 200; *Whitney v. Jenkinson*, 3 Wis. 407; *Smith v. McFall*, 18 Wend. 521.

⁶ *Arthur v. Wallace*, 8 Kan. 267. § 178 of the Kansas code requires that the plaintiff give an undertaking "to the effect that the plaintiff "shall duly prosecute the action and pay all costs and damages which "may be awarded against him, and *if the property be delivered to him*, "that he will return the same to the defendant if a return thereof be adjudged."

⁷ *State ex rel. v. Dunn*, 60 Mo. 64; *Henoch v. Chaney*, 61 Mo. 129.

⁸ *Graves v. Shufelt*, 60 Ill. 460.

⁹ Gen. St. Conn. § 1326.

cient because the plaintiff is described as surety and a third person as principal, both recognizors being in legal effect principals.¹

§ 697. **The court should always permit the bond to be amended** in the interest of substantial justice, as the property has been transferred at the time the attention of the court is called to defects in the bond. The court should not only permit but require any defects in the bond to be amended. Where the statute required two sureties, and the bond had but one, the court permitted a new bond with proper security to be given.² Where the appraisement was \$320.20, and the sheriff made oath that the 20 cents was a mistake, and the bond was in double \$320, an amendment of the recital was allowed.³ If the parties have become insolvent since the giving of the bond, the court should always require a new bond.⁴

§ 698. **Replevin bond may be amended.** The plaintiff may be allowed to file an amended bond.⁵ A replevin bond, imperfect in itself, and executed with but one surety, may be amended, after service of the writ, on the payment of costs of motion to set aside the proceedings.⁶ In New York the plaintiff on payment of costs will be allowed to amend an insufficient bond by filing a new one.⁷ Where the original bond is defective, a new bond may be filed *nunc pro tunc*.⁸ It is error to refuse to permit a defective replevin bond to be amended, or a new bond to be executed in lieu thereof, pending a motion to dismiss the action for want of a sufficient bond.⁹

¹ Dorus v. Somers (Conn.), 17 A. 852.

² Smith v. McFall, 18 Wend. 523; Hawley v. Bates, 19 Wend. 632; Whaling v. Sholes, 20 Wend. 673; Smith v. Howard, 23 Ark. 203.

³ Hammond v. Eaton, 15 Gray (Mass.), 186.

⁴ Cash v. Quenichett, 5 Heisk (Tenn.), 738.

⁵ Whaling v. Sholes, 20 Wend. 673; Smith v. Howard, 23 Ark. 203.

⁶ Hawley v. Bates, 19 Wend. (N. Y.) 632.

⁷ Whaling v. Sholes, 20 Wend. (N. Y.) 673.

⁸ Newland v. Willetts, 1 Barb. (N. Y.) 20.

⁹ Smith v. Howard, 23 Ark. 203.

§ 699. **When bond invalid—Illustrations.** A replevin bond the penalty of which is "double the value of the property hereinafter named to be replevied" is invalid for want of expressing the amount of the penalty, and if the objection be taken in time, the action must be dismissed.¹ Where there were five sureties on a replevin bond, and only three of them justified, and the aggregate amount for which they justified was less than double the sum specified in the undertaking, the bond was held insufficient.² A married woman has no power to sign a replevin bond.³ When the law under which plaintiff attempts to proceed in replevin has been repealed, no valid bond can be given.⁴

§ 700. **Ordinary bond does not take the place of security for costs.** A bond in replevin conditioned to prosecute the suit to effect, and pay any judgment that the defendant may recover in the suit, covers costs, and no security for costs need be given other than the replevin bond;⁵ but where the bond in replevin does not by its terms cover judgment for costs in favor of defendant, security for costs must be given in addition to the bond if it would be required in another form of action under the same circumstances.⁶ But bond has been held liable for costs after judgment of return.⁷

§ 701. **Giving redelivery bond waives what defenses.** Where defendant gives a bond and obtains a redelivery of the property under a statute providing for it, he thereby admits that he had possession of the property at the commencement of the suit. He is thereby estopped from alleging that it was not taken from him, and was not in his

¹ *Clark v. Connecticut*, 6 Gray (Mass.), 363.

² *Graham v. Wells*, 18 How. Pr. (N. Y.) 377.

³ *Coverdale v. Alexander*, 82 Ind. 503.

⁴ *Hicks v. Mendenhall*, 17 Minn. 453.

⁵ *Singer Manufacturing Company v. Rhodes*, 54 Conn. 48 (5 A. 610).

⁶ *Fleet v. Lockwood*, 17 Conn. 233.

⁷ *Rhodes v. Burkart*, (S. C.) 5 S. E. 347.

possession at the commencement of the suit.¹ Where the defendants give a forthcoming bond, they are estopped to deny that the property was found in their possession at the time of the levy of the writ.²

§ 702. **Effect of bond on title.** It has been held in Pennsylvania and Delaware that the plaintiff in a replevin suit can give a claim-property bond and acquire thereby a title to the property in dispute, which he can pass by sale to a third party *pendente lite*, but I think they are the only states following such a rule.³ The ordinary and better rule is that the giving of the bond does not give plaintiff any better title to the property than he had, but merely gives him the right to possess it until the further order of the court.⁴ The giving of a "claim-property" bond by the defendant in replevin, for a detention of the goods by him, extinguishes the plaintiff's property in the goods, and is a bar to an action of trover for the same goods. The plaintiff must look to the bond.⁵ While the bond takes the place of the property,⁶ it is only as to the possession of the property. The party giving the bond acquires no new title to the property thereby. The suing out of the writ, giving bond and taking possession, do not affect the title to the property, and if the defendant was an officer holding under a writ his lien is not destroyed, but only suspended, and if judgment is in his favor he may retake the property wherever he can find it.⁷

¹ *Divsy v. Morgan*, 74 N. Y. 11.

² *Benesch v. Waggnier* (Col.), 21 P. 706; *Hill v. Nelms* (Ala.), 5 So. 796.

³ *Hocker v. Striker*, 1 Dall. 245; *Pierce v. Humphreys*, 14 S. & R. 23; *Balsley v. Hoffman*, 13 Pa. 603; *Weaver v. Lawrence*, 1 Dall. 167.

⁴ *Farnham v. Chapman*, 60 Vt. 338 (14 A. 690).

⁵ *Rockey v. Burkhalter*, 68 Pa. 221; *Fisher v. Whoolery*, 1 Casey, 197.

⁶ *Webster v. Price*, 1 Root (Conn.), 56; *Buel v. Davenport*, 1 Root (Conn.), 261.

⁷ *Kayser v. Bauer*, 5 Kan. 202.

§ 703. **Does not give plaintiff a new title.** The bond takes the place of the property to the extent of the interest of defendant in replevin, *not exceeding the interest of plaintiff in replevin*.¹ But the title or possession thus acquired by plaintiff by virtue of his bringing replevin and giving the bond does not vest in him any greater title or interest than he claimed in the action of replevin, and gives him no new right or title to the property; and where his claim in the replevin suit was by virtue of a lien, and the defendant took the property and converted it, and the plaintiff in replevin then brought an action for damages, *held*, that he was only entitled to recover the amount of his special interest, if at all.² A bond in replevin imposes upon the obligors, in case a return is awarded, the duty of taking *active* measures to surrender the property.³

¹ *Jennings v. Johnson*, 17 Ohio, 155; *Williams v. West*, 2 Ohio St. 87; *Smith v. McGregor*, 10 Ohio St. 461; *Crittenden v. Lingle*, 14 Ohio St. 182.

² *Lugenbeal v. Lemert*, 42 Ohio St. 1.

³ *Jennison v. Haire*, 29 Mich. 207.

CHAPTER XXVI.

CUSTODY OF THE PROPERTY PENDING SUIT.

Section.	Section.
<p>At common law plaintiff took the property as his own . . . 704</p> <p>Status of property taken in replevin under the codes . . . 705</p> <p>Property taken in replevin is in the custody of the law . . . 706</p> <p>The custody of the property is under the control of the court 707</p> <p>While the replevin suit is pending the property cannot be seized on execution or other process 708</p> <p>Conflict of jurisdiction—Custody of property cannot be taken from court issuing the writ 709</p> <p>Nor can another action for its value be brought . . . 710</p> <p>Sheriff liable for custody of property until bond given . . 711</p> <p>Plaintiff has a right to possession while the suit is pending 712</p> <p>Different rule in Missouri . . . 713</p> <p>Law allowing defendant to retain it must be followed strictly 714</p>	<p>Title during suit—Redelivery bond—Second replevin . . . 715</p> <p>Plaintiff in replevin not liable as garnishee 716</p> <p>Proceedings in sister states—Property tortiously replevied—removed and sold . . 717</p> <p>Property taken in replevin is in the custody of the law—One unlawfully disturbing that possession may be punished for contempt . . . 718</p> <p>Money deposited in lieu of bond is not in <i>custodia legis</i> . . 719</p> <p>A replevin merely suspends a prior levy 720</p> <p>Effect of sale made by party in possession 721</p> <p>The same 722</p> <p>Injuries to goods in plaintiff's possession 723</p> <p>Effect of loss or destruction of property 724</p> <p>Surety on the bond cannot hold the property against the owner 725</p>

§ 704. At common law plaintiff took the property as his own. In the theory of the law the property was plaintiff's, and had been taken by distraint, and the distrainer could claim no title or ownership in the property, but only a right to make his claim for rent out of it. If there was no rent due him, of course he had no claim on the property.

If there was rent due him, he looked to the bond in replevin.¹ The same reasons do not exist in this country, and the theory of the common law has been adopted in very few decisions.²

§ 705. **Status of property taken in replevin under the codes.** It is a difficult matter to state concisely the *status* of property taken in replevin and turned over to plaintiff on his bond, or of property left in the hands of defendant on his giving bond. The statutes are not uniform, and the decisions under similar statutes are at variance. In a general way the property is regarded as in the custody of the law. Though held by a party to the suit, who has given bond, it is not, in most states, subject to sale by him; but he must hold it as an officer of the court, subject to the order of the court on the final determination of the suit. The supreme court of the United States has said that property in the hands of a claimant, under bonds to the sheriff for its delivery, is as far from the reach of other process as it would have been in the hands of the officer. The custody of the claimant is the custody of the officer; the property is not withdrawn from the custody of the law, and this, I think, is the correct rule.³ There is an apparent exception to this. Where the defendant in an attachment suit is allowed to replevy, it is held that other creditors may attach the same property when he has recovered possession. The first attaching creditors, if successful, must look to the bond. Thus, where plaintiff recovered of defendant, by writ of replevin, goods which he as sheriff had seized upon an attachment, *held*, that the sheriff was not thereby barred from again seizing the goods upon other attachments placed in

¹ 3 Black. Com. 146; Frey v. Leeper, 2 Dall. 131; Bruner v. Dyball, 42 Ill. 35; Waglam v. Cowperthwaite, 2 Dall. (Pa.) 68; Speer v. Skinner, 35 Ill. 282; Lowry v. Hall, 2 W. & S. (Pa.) 134; Acker v. White, 25 Wend. 614; Bradyall v. Ball Bros., Ch. Ca. 427.

² Hardy v. Keeler, 56 Ill. 152; Stevens v. Tuite, 104 Mass. 332; Miller v. White, 14 Fla. 435; Lovett v. Burkhardt, 44 Pa. St. 174. But a few of the decisions have followed the common law rule. Cary v. Hewitt, 26 Mich. 229.

³ Hagan v. Lucas, 10 Peters (U. S.), 400.

his hands by persons not parties to the replevin suit. Such successive attachments are not so vexatious that chancery will restrain them.¹

§ 706. **Property taken in replevin is in the custody of the law;** whether in the hands of a party to the suit who has given bond, or held by the officer, is immaterial. On the giving of the bond the property is placed in the custody of the claimant. His custody is substituted for that of the sheriff. The property is not withdrawn from the custody of the law.² In Georgia the possession of the property is not changed until after the first hearing. Then, if the plaintiff succeed, he must give a bond for its forthcoming if he be defeated on appeal or in any other action regarding the property, but if defendant recover he need not give bond.³

§ 707. **The custody of the property is under the control of the court.** If it is being wasted or destroyed by the party having it in possession under such circumstances that action on the bond would not result in adequate compensation, the court will see that the rights of the parties are protected. Pending trial of an action in replevin in a United States circuit court, the question of the disposition of the thing replevied will be heard by the court on motion by either party and notice to the other.⁴

§ 708. **While the replevin suit is pending, the property cannot be seized on execution or other process.** Where a chattel has been replevied, it may not, while it is in the possession of the sheriff, or, *it seems*, while in the possession of the plaintiff awaiting the result of the action, be levied upon by virtue of an execution against the defendant in said action. The judgment creditor can only claim through the title of his debtor, and the property having been lawfully re-

¹ Patterson v. Seaton, 64 Iowa, 115 (19 N. W. 869).

² Hagan v. Lucas, 10 Pet. 400. On the general proposition of seizing property already in *custodia legis*, see Stout v. La Follette, 64 Ind. 365; Metzner v. Graham, 57 Mo. 404.

³ Bush v. Rawlins, 80 Geo. 583 (5 S. E. 761).

⁴ Denniston v. Draper, 5 Blatchf. 336.

moved from the possession of the latter, and being held in the custody of the law for final adjudication, he cannot disturb that custody, but is confined to such remedy as will not interfere with it.¹ Where property levied upon as the property of A. has been replevied by B under claim of title, it cannot be again taken under execution against A while the action of replevin is pending and undetermined.² Where the plaintiff has given bond and taken possession of the property, it is in the custody of the law until the determination of the replevin suit, and cannot be seized by execution.³ Property replevied is in the custody of the law, and cannot again be levied on by the same sheriff holding a junior execution, or by any other officer holding an execution, and any such officer who makes such second levy does so in his own wrong and without authority of law.⁴ Where personal property held under execution is seized in replevin, and delivered to the plaintiff in replevin, and is again levied on by another execution, the proceedings in the second execution will be stayed until the determination of the replevin suit.⁵ Where an execution from the state court was levied by the sheriff upon property which was claimed by a stranger who, instead of replevin, brought the statutory action to try title, giving a bond for the property as provided by the statute, and the property was levied on while in this claimant's possession by an execution from a United States court, it was *held* by the United States supreme court that the property, while in the hands of the claimant, was in the custody of the law; that his custody, notwithstanding he had given a bond, was the

¹ First National Bank v. Dunn, 97 N. Y. 149 (2 Civ. Proceed. R. 259).

² Bates County Bank v. Owen, 79 Mo. 429; Pipher v. Fordyce, 88 Ind. 436.

³ Pipher v. Fordyce, 88 Ind. 436; Stout v. La Fallette, 64 Ind. 365; Hagan v. Lucas, 10 Pet. 400; Rhines v. Phelps, 3 Gilm. 455; Acker v. White, 25 Wend. 614; Sellick v. Phelps, 11 Wis. 398; Hilliard's Remedies for Torts (2d Ed.) p. 51, § 29; Freeman on Executions, 135.

⁴ Goodheart v. Bowen, 2 Bradw. (Ill.) 578; Rhines v. Phelps, 3 Gil. 455; Hagan v. Lucas, 10 Peters, 400.

⁵ People v. Superior Court, 19 Wend. (N. Y.) 701.

custody of the court where the claim was pending, and that the marshal had no more right to levy on it than if it had been in the actual custody of the sheriff of the state court,¹ thus giving the sanction of the highest authority for the principle already stated.²

§ 709. **Conflict of jurisdiction—Custody of property cannot be taken from court issuing the writ.** By the service of a writ of replevin, the court from which the writ issues obtains possession and control of the property replevied for all purposes of jurisdiction in the replevin suit, and no other court of concurrent jurisdiction can subsequently interfere with such possession. The same property cannot be subject to two jurisdictions at the same time, and the first levy, whether under state or federal authority, withdraws the property from the reach of the process of the other. It makes no difference that one of the parties may claim the property for the purposes of a public charity only.³ Where property has been seized by a sheriff, by virtue of a writ of replevin, issued out of a state court, and released to the defendant upon a forthcoming bond, it is still in the custody of the state court, to abide the result of the replevin suit, and while that is pending is not subject to seizure by the marshal under a writ of replevin subsequently issued out of a United States court, at the suit of the United States.⁴

§ 710. **Nor can another action for its value be brought.** While the suit in replevin is pending, the property is presumed to be held by process of law, and another action cannot be maintained in regard thereto between the same parties for the value of the same property.⁵

§ 711. **Sheriff liable for custody of property until bond given.** The sheriff should not deliver the property to the

¹ Hagan v. Lucas, 10 Pet. (U. S.) 400.

² Goodheart v. Bowen, 2 Bradw. (Ill.) 578.

³ The D. & F. Missionary Society v. Hinman, 2 McCrary, 543 (13 F. 161).

⁴ United States v. Dantzler, 3 Woods, 719 (5 Cir.)

⁵ Miller v. White, 14 Fla. 435.

plaintiff until a proper bond has been given. From the time it is taken by him until he can legally deliver it to some one else, he is liable for it on his official bond. He is not an insurer of the property, but is bound to take such care of it as a prudent man would of his own.¹ Thus it has been *held* that, where the sheriff left the property in the hands of the defendant, taking security for its forthcoming (when the statute did not provide for such a proceeding), he became liable if the property was destroyed by fire or otherwise, except the act of God or the public enemy.² He must care for it the same as in case of attached property.³

§ 712. **Plaintiff has a right to possession while the suit is pending.** Defendant in replevin cannot contest the plaintiff's right to the possession of the property after the plaintiff has given bond and while the suit is pending, nor even after judgment for the defendant, so long as the case is pending on *certiorari*. Where the plaintiff has given bond, he has the right to the possession until the suit be finally determined.⁴ Such delivery does not in any way affect the title to the property. It does not even tend to show title in the plaintiff. It is but a temporary right to the custody of the property, which is liable to be terminated at any time by the termination of the suit.⁵ If the suit is dismissed, nothing is determined in regard to the ownership, and the defendant may replevy.⁶

§ 713. **Different rule in Missouri.** In Missouri replevin may be maintained without an affidavit, but in such case the property is held by the officer until after judgment,

¹ Moore v. Westervelt, 21 N. Y. 103; Id. 1 Bos. (N. Y.) 358. See Rives v. Wilborne, 6 Ala. 45; Harlow's Shfs. § 43; Taylor's Landlord & T. § 740.

² Browning v. Hanford, 5 Denio, 586.

³ Hunt v. Robinson, 11 Cal. 262; Harlow's Shfs. § 41; Smith's Shfs. 286.

⁴ Ford v. Bushor, 48 Mich. 534 (12 N. W. 690).

⁵ Lovett v. Burkhardt, 44 Pa. St. 174; Speer v. Skinner, 35 Ill. 282; Bruner v. Dyball, 42 Ill. 34.

⁶ See Cross Replevies, Chap. XXXVIII and XXXIX.

and if it is delivered by him to the plaintiff before judgment, it will be ordered back into the custody of the officer; but the judgment will not be affected by failure to do this.¹

§ 714. **Law allowing defendant to retain it must be followed strictly.** Where the statute allows a defendant to counter-bond and retain the possession of the property pending the litigation, he must file his affidavit, and give notice and comply with the statute fully, or his counter-bond will be nugatory, and the plaintiff will be entitled to possession *pendente lite*.²

§ 715. **Title during suit—Redelivery bond second replevy.** Where a defendant in a replevin action executes a redelivery undertaking to the plaintiff, and receives a return of the property thereunder from the sheriff, the title to the property during the litigation remains the same as it was before, in every respect, except the defendant and those holding under him obtain thereby the right of possession, and such possession cannot be rightfully disturbed by plaintiff.³

§ 716. **Plaintiff in replevin not liable as garnishee.** Property replevied is in the custody of the law, and the plaintiff is bound to answer on his bond for the property, or a surplus over his claim, where that is special, and the property in his hands cannot be attached by garnishment.⁴

§ 717. **Proceedings in sister states—Property tortiously replevied, and removed and sold.** The plaintiff in an action of replevin in another state, having tortiously removed the property to this state and sold it, and the purchaser having been summoned as garnishee in attachment proceedings begun in this state by the defendant in replevin, the court, having acquired jurisdiction of the fund by the garnishment proceedings, will stay proceedings until a de-

¹ Eads v. Stephens, 63 Mo. 90.

² Teschner v. Deveron, 59 How. Pr. 467.

³ Turner v. Reese, 22 Kan. 319. (See Cross Replevies, Chap. XXXVIII and XXXIX.)

⁴ Nicholson v. Mitchell, 16 Bradw. (Ill.) 647.

termination of the replevin suit in the sister state, that full justice may be done.¹

§ 718. **Property taken in replevin is in the custody of the law, and one unlawfully disturbing that possession is in contempt.** Where property is replevied before a justice of the peace, and an appeal taken to the circuit court, if the defendant in replevin and another take the same from the plaintiff and place it beyond his reach, the circuit court will have the right to punish them by fine and imprisonment.²

§ 719. **Money deposited in lieu of bond is not in *custodia legis*.** Where, instead of giving bond under the statute to hold the property, the defendant deposits with the sheriff a sum of money, the money is not in *custodia legis*, and may be reached by garnishment proceedings.³

§ 720. **A replevin merely suspends a prior levy.** Where property has been levied on by execution and is replevied, until the determination of the replevin suit and settlement of the title to the property replevied by fair trial, neither the judgment nor the execution can be enforced either against the property of that defendant or his co-defendants. The levy was a *prima facie* satisfaction of the debt, and the replevin merely suspends it until final decision of the replevin suit.⁴ Where property is held under a levy and is taken from the officer by replevin, and the officer afterward got possession again by levying another writ on the property, it amounts to a taking possession under the first writ, and the lien of the first writ, which had been temporarily suspended by the replevin action, is revived in all its original force.⁵ The proceedings in replevin give a right to the tem-

¹ Hawkins v. Taylor, 15 Mo. App. 238.

² Knott v. The People, 83 Ill. 532. See People v. Neill, 74 Ill. 68; Yott v. The People, 91 Ill. 11.

³ Johnson v. Mason, 16 Mo. App. 271.

⁴ Hunn v. Hough, 5 Heis. (Tenn.) 708.

⁵ Hunt v. Robinson, 11 Cal. 272. In this connection, see also Goodheart v. Bowen, 2 Bradw. (Ill.) 578; Burkle v. Luce, 1 Comst. (N. Y.) 163; Hagan v. Lucas, 10 Pet. (U. S.) 400; McRae v. McLean, 3 Porter

porary possession of the property without any title until the right of possession is tried and determined, and does not impair the lien of an attachment that has been levied on the property.¹ The levy of an execution is regarded as a satisfaction *sub modo*, and the rule is not changed if the property is replevied from the officer, as the bond takes the place of the property, and no further levy can be made while the replevin suit is pending. But the levy is not a full satisfaction of the judgment, and if the plaintiff succeed in the replevin, another levy can be made.²

§ 721. **Effect of sale made by party in possession.** If the party thus placed in possession sell the property, and afterward the suit is determined in his favor, no question can arise; but if the suit be determined against him, quite serious questions arise. It has been *held* in such cases that he conveyed no title, and that his purchaser had no title against the true owner.³ The order of delivery in replevin confers no title. It gives only a temporary right, which may terminate at any time upon a judgment against the plaintiff. He cannot sell the property so as to defeat the title of the real owner. He has, however, a possession which the defendant or the real owner has no right to disturb. The property is in the custody of the law.⁴ Where property is taken from defendant and delivered to the plaintiff in an action of replevin, the defendant is not thereby divested of his title to the property. The burden of proof is on the plaintiff to establish on the trial his right to the possession.⁵ Where an innocent third party purchases from a plaintiff in possession, it has been *held* that he took a good title.

(Ala.), 138; *Rives v. Wilborne*, 6 Ala. 45; *Evans v. King*, 7 Mo. 411; *Lockwood v. Perry*, 9 Met. 444.

¹ *Caldwell v. Gans*, 1 Mont. 570.

² *Hunn v. Hough*, 5 Heisk. 713.

³ *Lockwood v. Perry*, 9 Met. 440; *Hunt v. Robinson*, 11 Cal. 262; *White v. Dolliver*, 113 Mass. 402.

⁴ *Hawkins v. Taylor*, 15 Mo. App. 238; *Bruner v. Dyball*, 42 Ill. 34; *Hagan v. Lucas*, 10 Pet. 400; *Mayberry v. Cliffe*, 7 Cold. (Tenn.) 117.

⁵ *Moore v. Herron*, 17 Neb. 697 (24 N. W. 425).

Where an action of replevin was dismissed by the plaintiffs before issue joined, and an order entered for a return of the property, which was not complied with by the plaintiffs, it was *held* that a chattel mortgage executed by them while in possession of the property, before the issuance of a writ of restitution, and taken by a mortgagee in good faith, was valid.¹ This case is probably no exception to the general rule just laid down, as the defendant was guilty of great *laches*.

§ 722. **The same.** If the plaintiff is the general owner of the property which he has taken in replevin from a wrongdoer, the fact that he had taken it in replevin would not affect his right to sell it.² If the plaintiff be both the general owner and entitled to possession, there is no question but that he may sell it and convey a good title while the suit is pending.³ If the property is only valuable for use, it should be put to use by the party having it in possession. If it be property of a perishable nature, such as fruit, he should sell it, and would not thereby increase his liability.⁴ Where the property consists of merchandise valuable and useful only for the purposes of sale, and the value of which is continually changing, or where it is valuable for consumption only, the plaintiff, without doubt, would be justified in

¹ Case *v. Woleben*, 52 Iowa, 389 (3 N. W. 486). Plaintiff dismissed his case July 30th, and writ of restitution did not issue until December 31st, during which time he held the horses, and had mortgaged them as his own.

² *Donohoe v. McAleer*, 37 Mo. 312; *Burkle v. Luce*, 1 Comst. (N. Y.) 163. See *Patterson v. Seaton*, 64 Iowa, 115 (19 N. W. 869,) where it is *held* that property retaken by replevin may be attached as the property of the debtor and plaintiff in replevin.

³ *Gimble v. Ackley*, 12 Iowa, 31; *Jones v. Peasley*, 3 Green (Iowa), 52; *Smith v. McGregor*, 10 Ohio St. 467; *Burkle v. Luce*, 6 Hill, 558; *Frey v. Leeper*, 2 Dall. (Pa.) 131; *Waglam v. Cowperthwaite*, 2 Dall. (Pa.) 68; *Bradyll v. Ball*, 1 Bro. Ch. C. 428.

⁴ *Gordon v. Jenny*, 16 Mass. 469; *Lockwood v. Perry*, 9 Met. 444; *Stevens v. Tuite*, 104 Mass. 332.

putting it to the use for which it was intended, and, if defeated, would only be liable on his bond for its value.¹

§ 723. **Injuries to goods in plaintiff's possession.** The plaintiff or defendant, where he bonds and retains the goods, is responsible for the safe-keeping and care of the property in controversy. If the property is broken, injured, or wasted, while in his possession, it is at his risk. In the case of fruit or perishable articles, it would be his duty to take such steps as would make the loss as light as possible; but he would be responsible for their full value at the time he took them if it be finally held that his taking was wrongful.² The party who has had possession cannot return the property in a less valuable condition than when he received it without being liable in damages.³

§ 724. **Loss or destruction of property; effect of.** If, during the pendency of the proceedings in replevin, the property shall have been lost, destroyed, or disposed of, so that no return thereof can be made, the only remedy of the defendant would seem to be either to sue on the bond or to sue for damages for the unauthorized and unlawful taking and conversion of the property.⁴

§ 725. **Surety on the bond cannot hold the property against the true owner,** even where he has taken possession of it to indemnify himself against loss. He is not a *bona fide* purchaser, and has no better title than the plaintiff.⁵

¹ Wells on Replevin, § 480; Mayberry v. Cliffe, 7 Cold. (Tenn.) 117; Gordon v. Jenney, 16 Mass. 469.

² Gordon v. Jenney, 16 Mass. 469; Stevens v. Tuite, 104 Mass. 332; Lockwood v. Perry, 9 Met. 444; Mennie v. Blake, 6 E. & B. (88 E. C. L.) 843.

³ Allen v. Fox, 51 N. Y. 562.

⁴ Barruel v. Irwin, 2 N. M. 223.

⁵ Kayser v. Bauer, 5 Kan. 202.

CHAPTER XXVII.

ANSWER.

	Section.		Section.
Appearance and pleading		Plea must be certain to a	
waives defects	726	common intent—Liberal	
Insufficiency of description is		construed	748
waived by pleading	727	Evidence should not be plead-	
Giving a redelivery bond is a		ed, but facts stated	749
waiver of defects	728	What is a good general denial	750
Too late to object to the suf-		Effect of and what may be	
ficiency after verdict	729	proved under	751
Objections, how taken	730	Fraud may be proved under a	
Avowry	731	general denial	752
Cognizance	732	Evidence of matter in estop-	
The nature of these pleas	733	pel	753
Pleas to an avowry	734	General denial does not com-	
Avowry is the usual plea to		pel proof of the negative	
replevin of a distress	735	averments	754
Set-off, to be allowed, must		Under general denial may jus-	
arise out of the leasing	736	tify under a writ	755
Avowry as a distinct plea is		May show official character	
little used	737	as administrator	756
The pleas of <i>non cepit</i> and		Justification under writ	
<i>non detinet</i>	738	—Proper averments	757
The plea or answer of defend-		Justification—Burden of	
ant	739	proof	758
A plea of <i>non cepit</i> admits the		Answers should allege amount,	
property to be in the plain-		levy, and validity of writ	759
tiff	740	If the officer did not take the	
The plea of <i>cepit in alio loco</i>	741	property from defendant,	
Special matter cannot be		must allege that it was his	760
shown under <i>non cepit</i>	742	Matter of inducement in plea	
Issue raised by <i>non detinet</i>	743	is not traversable	761
<i>Non detinet</i> can not be plead-		By officer—What answer	
ed for <i>non cepit</i>	744	should be—In case of fraud	762
Plea of not guilty	745	Defendant may plead as many	
Proper pleading under the		separate defenses as he may	
codes	746	have	763
The denials of the answer		All defenses must refer to the	
must be full and explicit	747	time the suit commenced	764

	Section.		Section.
Where there are several de-		Answers defective in substance	
fendants	765	—Examples	774
How far court may control		Special pleas—Incomplete de-	
defendant's pleading	766	fenses—Sufficient answer	775
Effect of plea of property in		Contradictory defenses . . .	776
defendant	767	Defendant cannot anticipate	
Plea of property in a third		special title not pleaded by	
person is good	768	plaintiff	777
A plea in bar is a good an-		Cannot show death of prop-	
swer	769	erty under general denial . .	778
Jurisdiction—Plea in abate-		A special property interest	
ment	770	cannot be shown under a	
Illustrations of sufficient an-		general denial	779
swers	771	Usury should be specially	
Replevin by a mortgagee—		pleaded	780
Defense	772	Fraud should be specially	
Plea of payment—No recovery		pleaded	781
for over-payment	773	Answer need not claim a re-	
		turn	782

§ 726. **Appearance and pleading waive defects in the petition and affidavit or writ.**¹ The declaration must state a place certain within the jurisdiction of the court, but the omission may be cured by defendant pleading over.² In Michigan the writ issues before the affidavit filed, but the affidavit must be made and attached to the writ before it is executed. Mere clerical defects in such an affidavit are waived by pleading to the merits.³ It is too late after issue joined in a replevin suit to object that a petition does not set out or contain a copy of a chattel mortgage under which plaintiff claims the property.⁴ If a defendant, by his de-

¹ Frink v. Flanagan, 6 Ill. 35; Smith v. Emmerson, 16 Ind. 355; Hyde v. Patterson, 1 Abb. Pr. (N. Y.) 248; Tripp v. Howe, 45 Vt. 523; Eddy v. Beal, 34 Ind. 161; Baker v. Dubois, 32 Mich. 92.

² Gardner v. Humphrey, 10 Johns. (N. Y.) 53.

³ Baker v. Dubois, 32 Mich. 92. The defect here was that the affidavit alleged that the property was not seized under execution *in attachment* instead of *or*, and against the goods and chattels of *this deponent* when the affidavit was not made by the plaintiff, and in place of *this deponent* should have been words descriptive of plaintiff, but these errors were *held* not fatal. A similar practice prevails in California. Laughlin v. Thompson, 76 Cal. 287.

⁴ Smith v. McLean, 24 Iowa, 322.

murrer or answer to the petition of a plaintiff, does not present to the trial court the legal incapacity of the plaintiff to sue, such defect is waived by him.¹ That the summons had no seal attached is waived by pleading in the action.² By pleading to the merits in a replevin case, defendant waives the objection that the writ was returnable on Sunday.³ Where a defendant in replevin appears and answers and appeals, he thereby waives defects in the petition and affidavit.⁴ Irregularities in the writ and bond are waived by an answer to the merits.⁵ An answer waives defects in a summons, as that it was issued by an unsworn deputy.⁶ Formal defects in the affidavit must be taken advantage of before pleading to the merits.⁷ The defendant, by answering without objecting to defects in the writ, or on the papers on which it issued, waives such objections and gives the justice jurisdiction to try the case.⁸

§ 727. **Insufficiency of description is waived by pleading.** Objections to the insufficiency or uncertainty of description must be made by the defendant at the first available opportunity, and if he omit to do so, plead to the merits and go to trial, he cannot ask the court to reverse the judgment because the description is uncertain.⁹ A complaint in replevin describing the property as "one hundred bushels of

¹ *Meyer Bros. v. Lane*, 40 Kan. 491 (20 P. 258). In this case it was claimed that the plaintiff was not twenty-one, and motion made to strike his affidavit.

² *Gullett v. Otey*, 19 Bradw. (Ill.) 182.

³ *Pierce v. Reh fuss*, 35 Mich. 53.

⁴ *Dickson v. Randal*, 19 Kan. 212; *Miller v. Bogart*, 19 Kan. 117.

⁵ *Tripp v. Howe*, 45 Vt. 523.

⁶ *Butts v. Screws*, 95 N. C. 215.

⁷ *Smith v. Emmerson*, 16 Ind. 355; *Lewis v. Brackenridge*, 1 Blackf. 112; *Perkins v. Smith*, 4 Blackf. 299; *Frink v. Flanagan*, 1 Gilm. 38.

⁸ *McKee v. Metraw*, 31 Minn. 429 (18 N. W. 148).

⁹ *Crum v. Elliston*, 33 Mo. App. 591. The description in this case was "nine head of hogs, mostly black," and it was held sufficient to enable the officers to identify the property. *Ruch v. Morris*, 28 Pa. St. 245; *Warner v. Aughenbaugh*, 15 S. & R. (Pa.) 9.

"wheat of the value of \$100, said wheat having grown in "and harvested on the 28th and 29th of July, 1885, having "been threshed off the following described real estate and "the wheat ground situate thereon." Describing the real estate, is sufficient after verdict.¹

§ 728. **Giving a redelivery bond is a waiver of defects.** The defendant waives an objection to the sufficiency of the plaintiff's affidavit by giving an undertaking and securing a redelivery to himself.²

§ 729. **Too late to object to the sufficiency after verdict.** After trial the defendant cannot object to the sufficiency of the affidavit.³ An objection to the sufficiency of the plaint in replevin should be taken by a motion to quash. It comes too late at the trial.⁴ After trial in replevin, and verdict for defendant, the plaintiff will not be permitted to avail himself of any uncertainty in his declaration.⁵ The allegation that the defendant wrongfully detains property of the plaintiff, although no demand is alleged, is sufficient after verdict.⁶ A petition in replevin which asks for a money judgment alone, and not for possession, is defective, but such defect is waived if not objected to before judgment.⁷

§ 730. **Objections, how taken.** Objections to the affidavit should be taken by motion or plea in abatement, not by demurrer.⁸ Where the objections are raised by motion, it should claim *oyer* of it to get it before the court and into the record.⁹ This decision arises under a practice which considers the affidavit as outside, and not a part of the record.¹⁰

¹ Hall v. Durham, 117 Ind. 429 (20 N. E. 282).

² Wisconsin Ma. F. v. Hobbs, 22 How. Pr. (N. Y.) 494.

³ Perkins v. Smith, 4 Blackf. (Ind.) 299.

⁴ Brown v. Keller, 32 Ill. 151.

⁵ Wilson v. Gray, 8 Watts (Pa.), 25.

⁶ Hurd v. Simonton, 10 Minn. 423.

⁷ Williams v. Wilcox, 66 Iowa, 65 (23 N. W. 266).

⁸ De Wolf v. Harris, 4 Mason C. C. 515.

⁹ Town v. Wilson, 3 Eng. (Ark.) 464.

¹⁰ Cox v. Grace, 5 Eng. (Ark.) 86.

§ 731. **Avowry.** Under the old form of replevin, where the defendant admitted the taking and justified it upon the ground of rent due, it was called an *avowry*, and the defendant was termed an *avowant*.¹ The avowant could support his avowry by rent in arrear that the beasts were taken *damage feasant*, or that they were taken on a judgment of the lord's court. When these pleas were denied by plaintiff an issue was made, and the question so presented was tried. If the plaintiff was successful, he was entitled to keep the property so replevied and to have damages for the wrongful taking and the loss it had occasioned him. If, however, he failed in the action, he was fined for his false clamor, and the avowant was entitled to a return and damages.²

§ 732. **Cognizance.** Where the defendant admitted the taking, but claimed that it was not by title or right in himself, but in a third party for whom he acted, it was called making *cognizance*, and he was called the *cognizor*.³ The distinction between avowry and cognizance was formal only, and if a mistake was made in the pleading it could always be cured by amendment.⁴ This plea has now fallen into disuse. The usual plea to a cognizance was to deny the agency or the authority of the principal, and it was *held* that the first was a proper plea, as, though the principal might have a right to distrain, a stranger not duly authorized as his agent could not.⁵

§ 733. **The nature of these pleas** was to make defendant the plaintiff; that is, he admitted the taking alleged by

¹ See Statute 21, Henry VIII. Ch. 19.

² *Riccards v. Cornforth*, 5 Mod. 366; *Woodcroft v. Kynaston*, 9 Mod. 305; *Anon*, Dyer, 141 a; *Britton*, Vol. I. p. 140; *Howard v. Black*, 49 Vt. 10; *Lindley v. Miller*, 67 Ill. 244; *Simpson v. McFarland*, 18 Pick. 430; *Quincy v. Hall*, 1 Pick. 361.

³ See Statute of 21, Henry VIII. Ch. 19; *Steph. Plead.* 332, 376; *Webber v. Shearman*, 6 Hill (N. Y.), 31.

⁴ *Brown v. Bessett*, 1 Zab. (21 N. J.) 46; *Wheadon v. Sugg*, Cro. Jac. 373.

⁵ *Trevilian v. Pyne*, 1 Salk. 107.

plaintiff and attempted to justify his act, and the courts held him to as much strictness in pleading as they did the plaintiff.¹ The pleading must admit the taking in express terms and state fully the authority by which it justified the taking.² The strictness of this rule was somewhat modified by statute.³

§ 734. **Pleas to an avowry.** The plaintiff could always plead *non tenure*, or nothing in arrears; either was proper and made a triable issue. The first denied the tenancy; the second denied there was any rent due. See Reply, *post*.⁴ He could plead, to the avowry, an abuse of the defendant's proceedings or their irregularity.⁵ Plaintiff could plead that the rent was not yet due, or that the goods were exempt from distress. Each avowry should be answered by at least one plea.⁶ The plea to an avowry need not allege the place of taking, when the avowry justified the taking at the place alleged in the declaration.⁷ An avowry justifying taking property under a *fi fa*, must aver that it was the property of the defendant in the execution and subject to the execution.⁸ Where the defense is distrained for rent, the defendant must allege and prove that the rent was due and in arrears,⁹ but

¹ Pike v. Goudell, 9 Wend. 149; Wright v. Williams, 2 Wend. 632; Yates v. Fassett, 5 Denio, 31; Crosse v. Bilson, 6 Mod. 103; Coon v. Bowles, 1 Show. 165.

² Gaines v. Tebbs, 6 Dana, (Ky.) 144; Waltman v. Allison, 10 Pa. St. 465; Lavigne v. Russ, 36 Miss. 326; McPherson v. Melhinch, 20 Wend. 671; Weeks v. Peach, 1 Salk. 179; Id. 1 Lord Raymond, 679; Hawkins v. Eckles, 2 Bos. & Pul. 359; Goodman v. Aylin, Yelv. 148; Hellings v. Wright, 14 Pa. St. 375; Simeoke v. Frederick, 1 Ind. 54; Trulock v. Rigby, Yelv. 185; Godfrey v. Bullin, Yelv. 180.

³ 21 Henry VIII., Chap. 19, § 3; 11 George II., Chap. 19, § 22; Forty v. Imber, 6 East. 434; Bain v. Clark, 10 Johns. 424; Ewing v. VanArsdale, 1 S. & R. (Pa.) 370; Caldwell v. Cleadon, 3 Har. (Del.) 420; Scott v. Fuller, 3 Pa. 55.

⁴ Chap. XXIX. Bloomer v. Juhel, 8 Wend. 448.

⁵ Osgood v. Green, 10 Fost. (N. H.) 210.

⁶ Nichols v. Dusenbury, 2 Comst. 287; Roberts v. Tennell, 4 Litt. (Ky.) 286.

⁷ Judd v. Fox, 9 Cow. 362.

⁸ Dillon v. Wright, 4 J. J. Marsh (Ky.), 254.

⁹ Lovigne v. Russ, 36 Miss. 326.

it need not be payable in money.¹ It might be payable in labor,² or anything of value.³ But it must be in something which could be reduced to a certainty, so the court could find a certain amount due at a certain time.⁴ Where the defendant, in his avowry, states the precise house or place, the plaintiff may traverse the place in the avowry, though not described with certainty in the declaration, but where no issue is raised the place is not material.⁵

§ 735. **Avowry is the usual plea to replevin of a distress**, and where distress for rent is still allowed, the answer or plea by the landlord is still called an avowry, and it will be observed that the cases referred to under this head are English cases, or cases which arose before the adoption of the code of procedure by the several states. The avowry must allege the seizure of the property on the premises leased, or within the limits where distress is permitted, and that it was liable to distress.⁶ The avowry should state the terms of the lease, the amount of rent, and the date when due and the default.⁷ It need not state plaintiff's title, but should state the holding from the plaintiff,⁸ and that the avowant was the landlord.⁹ The avowant must set forth his title and allege the precise estate of which he is seized, or

¹ *Myers v. Mayfield*, 7 Bush (Ky.), 212.

² *Valentine v. Jackson*, 9 Wend. 302; *Smith v. Colson*, 10 John. 91.

³ *Fraser v. Davie*, 5 Rich. (S. C.) 59.

⁴ *Grier v. Cowan*, Addis (Pa.), 347; *Wells v. Hornish*, 3 Pen. & W. (Pa.) 30; *Phipps v. Boyd*, 54 Pa. St. 342; *Smith v. Fyler*, 2 Hill, 648.

⁵ *Gardner v. Humphrey*, 10 Johns. (N. Y.) 53.

⁶ *Williams v. Smith*, 10 S. & R. (Pa.) 202; *Weidel v. Roseberry*, 13 S. & R. 178; *Hill v. Stocking*, 6 Hill, 277; *Lindley v. Miller*, 67 Ill. 244; *McPherson v. Melhinch*, 20 Wend. 671; *Musprot v. Gregory*, 3 Mees. & W. 677; *Spencer v. McGowen*, 13 Wend. 256; *Blanche v. Bradford*, 38 Pa. St. 344; *Asbell v. Tipton*, 1 B. Mon. (Ky.) 300.

⁷ *Wells v. Hornish*, 3 Pen. & W. (Pa.) 30; *Phipps v. Boyd*, 54 Pa. St. 342; *Taylor v. Moore*, 3 Har. (Del.) 6; *Tice v. Norton*, 4 Wend. 667; *Smith v. Aurand*, 10 S. & R. 93; *Wright v. Williams*, 5 Cow. 345; *Lander v. Ware*, 1 Strobh. (S. C.) 15.

⁸ *Decker v. Livingston*, 15 Johns. 479; *Wright v. Matthews*, 2 Blackf. 187.

⁹ *Nicholas v. Dusenbury*, 2 Comst. 287.

the avowry is bad,¹ and a failure to do so is not cured by the plaintiff pleading over or by verdict on issue joined.² An avowry in replevin, that the taking of the goods was on premises leased, for which rent was in arrear, is good in *form*, although it does not allege that the distress was taken for that rent. Such avowry would be good in *substance*, when the plaintiff had declared in the *detinuit*, for the defendant might lawfully distrain the goods on the premises for rent, and detain them during the period allowed to replevy them. The landlord has neither a general nor special property in goods distrained for rent, nor right to their possession after service of the replevin, but must look to the bond.³ The defendant may avow generally for rent arrear, but if he state the lease specially he must state it truly.⁴ Where a person avows the taking and justifies it, he must set up the facts fully.⁵

§ 736. **Set-off, to be allowed, must arise out of the leasing.** The plaintiff in replevin cannot set off accounts against the distrainor unless it be such matters as grow out of the contract of leasing.⁶ But any damage growing directly out of the contract of leasing may be offset against any claim for rent due.⁷ But such claim for damages must be followed by an averment that the damage equals or is greater than the rent due, and over that no rent is due. If the damage claimed is based upon a special agreement, it must set up the agreement in full.⁸ For a fuller discussion of this matter, see "Recoupment and Set-off."

¹ Hopkins v. Hopkins, 10 Johns. (N. Y.) 369.

² Bain v. Clark, 10 Johns. (N. Y.) 424.

³ Baird v. Porter, 67 Pa. 105.

⁴ Taylor v. Moore, 3 Har. (Del.) 6; Tice v. Norton, 4 Wend. (N. Y.) 663.

⁵ Whittington v. Deering, 3 J. J. Marsh (Ky.), 684.

⁶ Beyer v. Fenstermacher, 2 Whart. (Pa.) 95.

⁷ Fairmon v. Fluck, 5 Watts (Pa.), 516; Lindley v. Miller, 67 Ill. 244; Sapsford v. Fletcher, 4 Term R. 512; Streeter v. Streeter, 43 Ill. 155; Wolgamot v. Bruner, 5 Har. & M. (Md.) 70.

⁸ Curtis v. Jones, 3 Denio 590.

§ 737. **Avowry as a distinct plea is little used in this country.** The requisites and sufficiency of the plea are shown in cases depending upon particular facts or statutes.¹ The theory of law involved in decisions on avowry is seldom of sufficient general importance to entitle them to a statement in this work. A few of the more important decisions will be briefly referred to.

§ 738. **The pleas of non cepit and non detinet admit property in the plaintiff and put in issue only the wrongful taking and detention,² and under those pleas alone, and, the plaintiff failing to sustain his action, it is error to award a return of the property to the defendant.** To justify that judgment there must not only be a plea of property in the defendant or a stranger, the effect of which is to put in issue the plaintiff's right to the property, either general or special, but the verdict must find the property not in the plaintiff.³ Neither the plea of *non cepit* nor *non detinet* denies the property in plaintiff, and neither is sufficient to give defendant the return of the property. To entitle him to a return, he must ask for it, or at least contest plaintiff's right to retain it by proper pleading.⁴ The usual form of *non cepit* is *non cepit modo et forma*, which is a direct denial of the taking in the manner and form alleged by plaintiff.

§ 739. **The plea or answer of defendant.** A plea of

¹ Southall v. Garner, 2 Leigh (Va.) 372; Brackett v. Whidden, 3 N. H. 17; Osgood v. Green, 30 N. H. (10 Fost.) 210; Brown v. Bissett, 21 N. J. L. (1 Zab.) 46; Shepherd v. Boyce, 2 Johns. (N. Y.) 446; Davis v. Tyler, 18 Johns. (N. Y.) 490; Wright v. Williams, 2 Wend. (N. Y.) 632; People v. New York, 2 Wend. (N. Y.) 644; Ewing v. Vanarsdall, Serg. & R. (Pa.) 370; Phipps v. Boyd, 54 Pa. St. 342; Barr v. Hughes, 54 Pa. St. 516; Gipson v. Bump, 30 Vt. 175; Keith v. Bradburry, 39 Vt. 34; Swearingen v. Magruder, 4 Har. & M. (Md.) 347; Brown v. Bissett, 21 N. J. L. (1 Zab.) 267; James v. Dunlap, 3 Ill. (2 Scam.) 481; Loomis v. Tyler, 4 Day (Conn.), 141.

² Talcott v. Anderson, 1 Gilm. 365; Vose v. Hart, 12 Ill. 378; Ingalls v. Bulkley, 15 Ill. 224.

³ Mattson v. Hanisch, 5 Bradw. (Ill.) 102.

⁴ Chandler v. Lincoln, 52 Ill. 74; Anderson v. Talcott, 1 Gilm. 345.

non cepit or *non detinet* in replevin admits of property in the plaintiff and takes issue only on the taking and detention.¹ Where the action is *in the cepit*, the general issue is *non cepit*, which is a simple denial of the taking and an admission of the plaintiff's property in the thing taken.² The defendant may deny in his plea that the property claimed by the plaintiff had been or was in his possession at the time action was brought, in which case it would devolve upon the plaintiff to show the contrary.³ If the defendant take issue upon the plaintiff's right to the property, the plaintiff must show his right to it or fail in the action, and an allegation in the plea or answer of property in a third person will be regarded as an inducement to the traverse and a denial of the plaintiff's title.⁴ The defendant may plead that he is a tenant in common with the plaintiff in the property sought to be recovered, and if this is established by evidence on the trial, it is a good defense.⁵ So an officer may admit the taking of the property, but state facts showing that he was justified in taking, as that it was taken by virtue of an execution or other legal process, which process was in full force and effect at the time of the taking;⁶ such plea admits plaintiff's right to the property before levy. Where there are several defendants, they may each plead separately.⁷ *Non cepit* in

¹ Mackinley v. McGregor, 3 Whart. (Pa.) 369 (31 Am. Dec. 522); Van Namee v. Bradley, 69 Ill. 299.

² Sanford Manufacturing Company v. Wiggin, 14 N. H. 441 (40 Am. Dec. 198); Ely v. Ehle, 3 N. Y. 506; Vickey v. Sherburne, 20 Me. 34; Vose v. Hart, 12 Ill. 378; Carroll v. Harris, 19 Ark. 237; Harper v. Baker, 3 T. B. Mon. (Ky.) 421.

³ Wheeler v. Allen, 51 N. Y. 37.

⁴ Pope v. Jackson, 65 Me. 162; Landers v. George, 40 Ind. 160; Atkins v. Burnes, 71 Ill. 326; Peake v. Conlon, 43 Iowa, 297; Van Namee v. Bradley, 69 Ill. 299; Ingraham v. Hammond, 1 Hill (N. Y.), 353; McIlveine v. Holland, 5 Harr. (Del.) 10; Dover v. Rawlings, 2 M. & R. (Eng.) 544.

⁵ Davis v. Lottich, 46 N. Y. 393; Walker v. Spring, 5 Hun. (N. Y.) 107; Hudson v. Swan, 7 Abb. (N. C.) 324.

⁶ Dayton v. Fry, 29 Ill. 525; Raiford v. Hyde, 36 Ga. 93; Griffith v. Smith, 22 Wis. 646.

⁷ Boyd v. Adams, 16 Ill. 146.

replevin puts in issue the question of general property only, and not of special property. On *non cepit* the issue must be for the defendant, if there was not a wrongful taking of the goods from the possession of another.¹ *Non cepit* throws the burden on plaintiff to prove property in himself.² The plea of *non cepit* in an action of replevin puts in issue only the taking.³ Its office is to deny the taking. Its legal effect is to admit title to the property to be in the plaintiff. It admits every fact alleged by plaintiff except the taking.⁴ Under this plea defendant can not ask damages or a return, nor can he prove property in himself or a stranger.⁵

§ 740. A plea of *non cepit* admits the property to be in the plaintiff, and of course, on that plea, the defendant cannot have judgment for damages.⁶ And under such a plea the plaintiff must prove an unlawful taking, and if the evidence shows that the property came into defendant's possession by plaintiff's consent, a non-suit should be granted.⁷ A plea of property in defendant raises a question of title, and a finding of wrongful detention does not meet the issue.⁸ In a proceeding under the statute for the claim and delivery of

¹ Meany v. Head, 1 Mass. 319.

² Cooper v. Bakeman, 32 Me. 192.

³ Rowland v. Mann, 6 Ired. L. (N. C.) 38; Ely v. Ehle, 3 N. Y. (3 Comst.) 506; Vickery v. Sherburne, 21 Me. 34; Harper v. Baker, 3 T. B. Mon. (Ky.) 421; Galusha v. Butterfield, 3 Ill. (2 Scam.) 227; Trotter v. Taylor, 5 Blackf. (Ind.) 431; Wilson v. Royston, 2 Ark. 315; Bourk v. Riggs, 38 Ill. 320; Vose v. Hart, 12 Ill. 378; Ringo v. Field, 6 Ark. 43; Carroll v. Harris, 19 Ark. 237.

⁴ Ely v. Ehle, 3 Comst. 510; Coit v. Waples, 1 Minn. 134; Marshal v. Davis, 1 Wend. 115; Rogers v. Arnold, 12 Wend. 34; Trotter v. Taylor, 5 Blackf. 431; Ringo v. Field, 1 Eng. (6 Ark.) 43; Douglas v. Garrett, 5 Wis. 88; Seymour v. Billings, 12 Wend. 286; Hopkins v. Burney, 2 Fla. 46; Galusha v. Butterfield, 2 Scam. 227; Carroll v. Harris, 19 Ark. 238; Wilson v. Royston, 2 Ark. 315; Green v. Dingley, 24 Me. 137.

⁵ Hopkins v. Burney, 2 Fla. 45; Smith v. Snyder, 15 Wend. 327; Miller v. Sleeper, 4 Cush. (Mass.) 370; Vickery v. Sherburne, 20 Me. 35; Butcher v. Porter, 1 Salk. 94; Bourk v. Riggs, 38 Ill. 321.

⁶ Mitchell v. Roberts, 50 N. H. 486; Johnson v. Wollyer, 1 Strange, 507.

⁷ Carter v. Piper, 57 N. H. 217.

⁸ Page v. Ramsdell, 59 N. H. 575.

personal property, the plea of *non cepit* admits the plaintiff's title, but it is incumbent on him to prove that the defendant had the goods, but where the issue raises the question of title, the burden is on the plaintiff to prove that at the time of the caption he had the general or special property in the goods taken and the right of immediate and exclusive possession.¹ Under a plea of *non cepit* and property in defendant, *held*, that defendant was entitled to prove a lien for repairs to the property replevied, made by him and unpaid for.² Pleas of *non cepit* and property are not inconsistent.³ A defendant may plead *non cepit* and property in himself or a stranger.*

§ 741. The plea of *cepit in alio loco* does not admit the taking as laid in the declaration, and the plaintiff is bound to show his right to recover, as if the plea had been *non cepit*.⁵ But as such a plea admits the taking, but at another place than that laid by plaintiff, good pleading would require it to be followed up with an avowry or cognizance.⁶

§ 742. Special matter cannot be shown under *non cepit*. The plea of *non cepit* in replevin admits the property to be in the plaintiff, and no special matter of justification can be

¹ Gray v. Parker, 38 Mo. 160.

² Halstead v. Cooper, 12 R. I. 500, citing Murray v. Paisley, 1 Yeates, 197; Lowry v. Hall, 2 W. & Serg. 129; Amos v. Sinnott, 5 Ill. 441; Redmon v. Hendricks, 1 Sandf. 32; Britt v. Aylett, 11 Ark. 475; Harwood v. Smethurst, 29 N. J. Laws, 195; Lester v. McDowell, 18 Pa. St. 91; Walpole v. Smith, 4 Blackf. 304; Bogard v. Jones, 9 Humph. 739; Berthold v. Holman, 12 Minn. 335; Rockwell v. Saunders, 19 Barb. 473; Collins v. Evans, 15 Pick. 63; 2 Greenl. Ev. § 563.

³ Cummings v. Gaun, 52 Pa. St. 484; Shuter v. Page, 11 Johns. (N. Y.) 196; Simpson v. McFarland, 18 Pick. (Mass.) 427; Whitwell v. Wells, 24 Pick. (Mass.) 25; Dickson v. Mathers, Humpst. 65.

⁴ Edelin v. Thompson, 2 Har. & G. (Md.) 31; Smith v. Morgan, 8 Gill. (Md.) 133; Moulton v. Bird, 31 Me. 296; Martin v. Watson, 8 Wis. 315.

⁵ Williams v. Welch, 5 Wend. (N. Y.) 290.

⁶ Lougee v. Colton, 9 Dana (Ky.), 123; Sawyer v. Huff, 25 Me. 465; Amos v. Sinnott, 4 Scam. 445; Snow v. Como Street Railway, 507; Chit. Plea., Vol. I., p. 499.

shown under it; neither can a judgment for a return, nor for damages, be rendered on such a plea for the defendant.¹

§ 743. **Issue raised by non detinet.** It is a fundamental rule in pleading that a fact asserted upon one side, and not denied on the other, is admitted. Where a wrongful taking is alleged in a declaration and the answer is *non detinet*, this admits the fact of the wrongful taking.² In replevin the plea of *non detinet* puts in issue the plaintiff's title and the wrongful detention by the defendant, and to entitle the plaintiff to recover he must prove both his title and the detention by defendant.³ In Ohio, under a plea of *non detinet*, all the defenses allowable under both that plea and a plea of property in the defendant are admissible.⁴ The plea of *non detinet* puts in issue not only the wrongful detention, but the plaintiff's right of property.⁵ Where the action is *in the detinet* the general issue is *non detinet*, and this plea raises the question of the detention.⁶ Under a plea of *non detinet* and a general denial the general issue is raised, and all rights of the respective parties may be shown and determined. Such is the established rule in Nebraska.⁷ Under the issue formed by this plea the plaintiff must prove his right to immediate and exclusive possession of the goods and the wrongful detention by the defendant.⁸ The defendant may show that he returned the goods before suit or that he never had them.⁹

§ 744. **Non detinet can not be pleaded for non cepit.** Although these two pleas are alike in their general principles,

¹ Hopkins v. Burney, 2 Fla. 42; McFarland v. Barker, 1 Mass. 153.

² Simmons v. Jenkins, 76 Ill. 479.

³ Neis v. Gillen, 27 Ark. 184.

⁴ Coverlee v. Warner, 19 Ohio, 29.

⁵ Ingalls v. Bulkley, 15 Ill. 224; Patterson v. Fowler, 22 Ark. 396.

⁶ Coverlee v. Warner, 19 Ohio, 29; Neis v. Gillen, 27 Ark. 184.

⁷ Cool v. Roche, 15 Neb. 24 (17 N. W. 119); Richardson v. Steele, 9 Neb. 486; Hedman v. Anderson, 8 Neb. 180; School District v. Shoemaker, 5 Neb. 36.

⁸ Amos v. Sinnott, 4 Scam. 445; Rogers v. Arnold, 12 Wend. 30.

⁹ Johnson v. Howe, 2 Gilm. 345.

non detinet is not a good plea to replevin in the *cepit*, and such plea will be stricken out on motion.¹ In replevin against two, each may plead *non detinet* separately, and a plea of property in one is good upon general demurrer.² In replevin for the unlawful detainer of goods, *non cepit* is not a good plea; the general issue in such cases is *non detinet*.³

§ 745. **Plea of not guilty** is the proper plea to raise the general issue in some states. In Florida the plea of not guilty, the general issue in replevin, puts in issue the taking and detention, but not the right of property and possession of the plaintiff.⁴ In Mississippi, not guilty is the proper plea to an action of replevin, and is a full and complete answer, and any other plea may be stricken out or disregarded as surplusage.⁵ Not guilty is the general issue in replevin in Missouri.⁶ The general issue, not guilty, in replevin, puts in issue every fact stated in the declaration necessary to sustain plaintiff's action, and not alone the detention of the property.⁷ Not guilty is the general issue in replevin in Vermont, and such plea puts in issue every material fact, as well the property as the taking and detention.⁸ And under such plea defendant may justify under legal process.⁹ But this does not apply in case of replevin for beasts impounded. In such cases defendant can justify only as at common law, under an avowry setting forth the facts relied upon.¹⁰

§ 746. **Proper pleading under the codes.** Under most of the statutes to-day the proper way to raise the issue in replevin is to deny each and every allegation made by plaintiff. But as the issue is as to the possession, anything which

¹ Davis v. Calvert, 17 Ark. 85.

² Boyd v. McAdams, 16 Ill. 146.

³ Walpole v. Smith, 4 Blackf. (Ind.) 304.

⁴ Stewart v. Mills, 18 Fla. 57; Holliday v. McKinnie, 22 Fla. 153.

⁵ Bennett v. Holloway, 55 Miss. 211.

⁶ Gibson v. Mozier, 9 Mo. 256.

⁷ Child v. Child, 13 Wis. 17; Loomis v. Foster, 1 Mich. 165.

⁸ Plainfield v. Batchelder, 44 Vt. 9.

⁹ Loop v. Williams, 47 Vt. 407.

¹⁰ Howard v. Black, 49 Vt. 9.

denies the plaintiff's right of possession at the commencement of the suit goes to the gist of the action and puts the plaintiff on proof of his right to possession, and is a sufficient answer. Any allegation which does this may be regarded as a proper pleading in replevin. The technical denials of the common law are very little used under the modern practice, but the principle and effect are the same. A plea of some kind is necessary, and the want of it is not cured by verdict.¹ The common law pleadings in replevin do not exist under the statute, and a denial of the allegation of the petition putting them in issue is sufficient, and the answer does not have the technical effect which it had at common law.²

§ 747. **The denials of the answer must be full and explicit,** and squarely traverse all the essential allegations of plaintiff's affidavit.³ In replevin, the plea should not only allege that the goods and chattels mentioned in the declaration were not the property of the plaintiff, but should also allege whose they were; otherwise, the plea is bad.⁴ Thus the denial of the unlawful detention does not put in issue the allegation in the petition that notice was given defendant that plaintiff claimed the property before the replevin suit was brought.⁵ Where the plaintiff alleges and relies on possession, the defendant need not deny this specifically, but may state any fact which will defeat the plaintiff's action.⁶

§ 748. **Plea must be certain to a common intent, liberally construed.** A clause in a plea in replevin averring that the property in dispute is in the succession of A., without naming the persons in succession, is good.⁷ A plea in replevin is not objectionable on account of obscurity or ambiguity, if it be certain to a common intent. It need only be

¹ *Lecky v. McDermot*, 5 Serg. & R. (Pa.) 331.

² *Jansen v. Effey*, 10 Iowa, 227.

³ *Richardson v. Smith*, 29 Cal. 529.

⁴ *Austice v. Holmes*, 3 Den. (N. Y.) 244.

⁵ *Bensley v. McMillan*, 49 Iowa, 517.

⁶ *Skinner v. Chicago, &c.*, 12 Iowa, 191.

⁷ *Anderson v. Dunn*, 19 Ark. 650.

clear enough according to reasonable intendment and construction. The rule is that the natural sense must prevail. The words "there" and "said" will not be referred to the last antecedent, if the sense requires that they should be referred to some prior antecedent.¹ In an action of replevin for certain ties, timber, and bridges, defendants in their answer denied that plaintiff was entitled to the immediate possession of the same, and denied the unlawful detention, but claimed a salvor's lien on the property for rescuing it from the flood. On demurrer to the answer: *Held*, that it stated a good defense, notwithstanding its failure to allege a full compliance with the salvage act.²

§ 749. **Evidence should not be pleaded, but facts stated.** Where defense is tenancy in common, the plea should aver the tenancy, and then prove the facts showing it on the trial, and not plead the evidence.³ To an action for replevin of a horse, the defendant pleaded that he took him up as an estray and advertised him, and that the plaintiff brought this action before the statutory time had expired. The plea was *held* good.⁴

§ 750. **What is a good general denial.** Where an answer, after sufficiently admitting or denying certain allegations, denies each and every allegation not thus admitted or denied, it is sufficient, and where the action is based solely upon a wrongful detention, a general denial puts in issue as well plaintiff's property in the chattel as the wrongful detention, and defendant under such a plea may show title in a stranger, although he does not connect himself with it.⁵ An answer in replevin, which avers that the defendant was

¹ *Lammers v. Meyer*, 59 Ill. 215.

² *B. & M. R. R. v. Young Bear*, 17 Neb. 668 (24 N. W. 377).

³ *Alwood v. Ruckman*, 21 Ill. 200.

⁴ *Barnes v. Tannehill*, 7 Blackf. (Ind.) 604.

⁵ *Griffin v. L. I. R. R.* 101 N. Y. 348 (9 Civ. Proc. R. 84; 4 N. E. 740); *Caldwell v. Bruggermann*, 4 Minn. 270; *Jones v. Rahilly*, 16 Minn. 320; *Kennedy v. Shaw*, 38 Ind. 474; *Sparks v. Heritage*, 45 Ind. 66; *Siedenbach v. Riley*, 111 N. Y. 560 (19 N. E. 275; 2 How. Pr. 143).

and is the owner of the property replevied, and denies plaintiff's right to maintain the action, puts in issue the plaintiff's title to the property.¹ An answer which denies the unlawful detention puts in issue the right to the property and the right to the possession.²

§ 751. **Effect of, and what may be proved under.** Both the right of property and the right of possession are put in issue by a general denial. A general denial puts in issue every material allegation of the petition, and under it the defendant may give evidence of any special matter which amounts to a defense to the plaintiff's cause of action, as fraud in plaintiff's title, or possession as an officer under a writ by defendant.³ Value is put in issue by a general denial, and must be proved.⁴ In replevin a general denial puts in issue the plaintiff's right to the possession of the property at the commencement of the action, and every collateral fact necessary to the establishment of the same. An answer containing a general denial will not be required to be more definite and certain.⁵ A general denial requires plaintiff to make out title in himself, and authorizes the defendant to introduce proof of title in himself or a third person, whereupon the plaintiff may introduce evidence to overthrow this

¹ Chase v. Allen, 5 Allen (Mass.), 599.

² Moore v. Kepner, 7 Neb. 291.

³ Bailey v. Swain, 45 Ohio St. 657 (16 N. E. 370); Oaks v. Wyatt, 10 Ohio, 344; Ferrell v. Humphrey, 12 Ohio, 113; School District v. Shoemaker, 5 Neb. 36; Creighton v. Newton, 5 Neb. 100; Richardson v. Steele, 9 Neb. 483; Sopris v. Truax, 1 Col. 89; Snook v. Davis, 6 Mich. 156; Jensen v. Effey, 10 Iowa, 227; Holmberg v. Dean, 21 Kan. 73; Branch v. Wiseman, 51 Ind. 1; Staubach v. Rexford, 2 Mont. 566; Verry v. Small, 16 Gray, 121. Pomeroy in his Remedies and Remedial Rights, § 678, *et seq.*, lays down a contrary rule and cites Frisbee v. Langworthy, 11 Wis. 375; and Glazier v. Clift, 10 Cal. 303. But this is based on the common law rule of pleading in replevin, and that rule, in the absence of express statutory provision, has not been followed by the courts since the introduction of the code procedure. Merrill v. Wedgewood, 25 Neb. 283 (41 N. W. 149).

⁴ Thompson v. Scheid, 39 Minn. 102 (38 N. W. 801); German American Bank v. White, 38 Minn. 471 (38 N. W. 361).

⁵ Aultman v. Stichler, 21 Neb. 72 (31 N. W. 241).

and establish his title.¹ Property in defendant or in a stranger is a good defense, but is not necessary if a general denial is put in. Where property in a stranger is relied upon, it is not necessary that he be made a party to the action.² In Arkansas general denials are not allowed, and *non detinet* is held not to be a good and sufficient plea to an action of replevin.³ In replevin a general denial is sufficient to put plaintiff to proof of title or right of possession, without any averments of title in defendant or in a stranger.⁴ An answer in replevin denying the plaintiff's ownership of the property in controversy casts the burden of proof upon him. He must recover upon the strength of his own title, not upon the weakness of his adversary's.⁵ In replevin in detainer the general issue raises the question of the property of plaintiff.⁶

§ 752. **Fraud may be proved under a general denial.** Under a general denial in replevin defendant may prove that plaintiff's title was founded in fraud or any other matter that bars plaintiff's right, and paragraphs of the answer specially pleading these facts will be stricken out on motion.⁷

§ 753. **Evidence of matter in estoppel** may be given and availed of as a defense under a general denial and without being pleaded specially.⁸

¹ Kennedy v. Shaw, 38 Ind. 474; Davis v. Warfield, 38 Ind. 461; Farmer v. Calvert, 44 Ind. 209; Sparks v. Heritage, 45 Ind. 66; Merrill v. Wedgewood (Neb.), 41 N. W. 149.

² Thompson v. Sweetser, 43 Ind. 312; Siedenbach v. Riley (N. Y.), 19 N. E. 275.

³ Tyner v. Hays, 37 Ark. 599. This case is not authority outside of the state.

⁴ Pulliam v. Burlingame, 81 Mo. 111; Gray v. Parker, 38 Mo. 160.

⁵ Kennedy v. Clayton, 29 Ark. 270; Patterson v. Fowler, 22 Ark. 396; Dixon v. Thatcher, 14 Ark. 141; Anderson v. Dunn, 19 Ark. 650; Robinson v. Calloway, 4 Ark. 94.

⁶ Ashby v. West, 3 Ind. 170; Dillingham v. Smith, 30 Me. 370; Huron v. Beckwith, 1 Wis. 17; Kennett v. Fickle (Kan.), 21 P. 93.

⁷ Lane v. Sparks, 75 Ind. 278; Wiler v. Manley, 51 Ind. 169; Davis v. Warfield, 38 Ind. 461; Landers v. George, 40 Ind. 160; Riddle v. Parke, 12 Ind. 89; Kennedy v. Shaw, 38 Ind. 474.

⁸ Towne v. Sparks, 23 Neb. 143 (36 N. W. 375).

§ 754. **General denial does not compel the proof of the negative averments.** A general denial in replevin does not compel plaintiff to prove the negative averments of his affidavit, as that the property *was not taken in execution*, etc.,¹ unless they are pleaded as facts. Neither does it deny the averments of value in the petition, but the value is a question of proof, and the jury should determine the value from the evidence, whether it be denied or not.²

§ 755. **Under a general denial may justify under a writ.** Where a defendant files a general denial, he may justify under legal process against the rightful owner, but one claiming title in himself is held to great strictness in setting it out.³ In replevin, all that is necessary, in order to enable the defendant to prove any defense which he may have, is to deny all the allegations of the plaintiff's petition. Where the defense is that the defendant holds the property under legal process issued against the property of the plaintiff, the defendant need not allege in detail the nature of the action in which such process was issued, nor the jurisdiction of the justice to issue such process.⁴ Under a general denial he may show that he had a right to detain the property, and therefore his possession was not wrongful.⁵ Under a general denial defendant may prove that he is a constable and levied on the property under an execution against a third party, and that such third party and the plaintiff own the property as partners, and under such a state of facts plain-

¹ *Westenberger v. Wheaton*, 8 Kan. 169; *Carney v. Doyle*, 14 Wis. 270; *Hudler v. Golden*, 36 N. Y. 446; *O'Reille v. Good*, 42 Barb. 521.

² *Chicago, &c., v. Northwestern, &c.*, 38 Iowa, 377.

³ *Bosse v. Thomas*, 3 Mo. App. 472; *Armstrong v. McMillan*, 9 Mo. 721; *Smith v. Winston*, 10 Mo. 299; *Snook v. Davis*, 6 Mich. 156; *Schulenburg v. Harriman*, 21 Wall. 44; *Jansen v. Effey*, 10 Iowa, 227; *Oaks v. Wyatt*, 10 Ohio, 344; 2 Nash. Pl. & Pr. 834; *Schaffer v. Foldwesch*, 16 Mo. 337; *Rogers v. Ledwell*, 3 Mo. App. 599.

⁴ *Bailey v. Boyne*, 20 Kan. 657.

⁵ *Holmberg v. Dean*, 21 Kan. 73.

tiff cannot recover.¹ If the defendant claims possession by virtue of a writ, it is sufficient if his answer sets up the date and amount of the writs and the names of the parties without appending copies.²

§ 756. **May show official character as administrator.** Under a general denial the defendant may show his official character as special administrator, and that as such he was entitled to the possession of the property, and this without notice.³

§ 757. **Justification under writ—Proper averments.** In replevin against a constable who held the goods in controversy as the property of a third person under a writ of attachment, the defendant justified under the writ, and after verdict it was objected that it was not alleged in the plea that a debt was due from the attachment defendant to the plaintiff. *Held* (1), that if such averment was necessary, an allegation in the plea that the attachment was for \$250, that the writ was at the time of the levy in full force and effect, and that the amount claimed was unpaid, was sufficient after verdict; (2) that the defendant having also pleaded property in the attachment defendant, he was at liberty to put in the same defense under that plea; (3) that it is not necessary that the defendant should aver in his plea of justification or prove at the trial that the writ of attachment was duly returned, or that there was cause for suing out the attachment.⁴

§ 758. **Justification—Burden of proof.** The defendant in his answer denied plaintiff's ownership, justified his taking under an attachment (followed by judgment and execution) against one F., who was the plaintiff's vendor, and alleged that F. at the time of the taking was the owner and in possession, and further alleged that the claim of the plaintiff

¹ *Branch v. Wiseman*, 51 Ind. 1; *Levi v. Darling*, 28 Ind. 498; *Martin v. Watson*, 8 Wis. 315.

² *Kingsbury v. Buchanan*, 11 Iowa, 387.

³ *Singer Manufacturing Company v. Benjamin*, 55 Mich. 330.

⁴ *McCraw v. Welch*, 2 Col. 284.

was based upon a pretended transfer from F. to him for the purpose of defrauding F.'s creditors, which purpose was known to plaintiff. *Held*, that this was a proper plea in justification, and when shown by defendant put upon plaintiff the burden of showing the *bona fides* of the transaction by which he claimed title, and that a finding by the court that the sale from F. to plaintiff was not followed by an immediate and continued change of possession was within the issue made by the plea of justification.¹ Where goods are replevied by A from a sheriff who holds them by virtue of an execution against B, an answer alleging that said goods were in fact the property of B when seized raises a material issue, and, if true, constitutes a good defense to the action.

§ 759. **Answer should allege amount, levy, and validity of writ.** A plea to an action justifying the taking because it was done by virtue of a writ must aver that the writ was in full force, the money unpaid, and that the property was taken in pursuance of its authority.² Where the defendant in replevin answers that he held the property under writs as a marshal or sheriff, but does not state their amount, the burden is on defendant to prove the amount before he can receive judgment for the value of the property and damages.³ An answer which justifies the taking complained of by plaintiff under legal process, and prays judgment for a restitution or its value, is good.⁴ The amount of the *fi fa* under which a constable held the property being stated in blank will not be fatal after issue and verdict.⁵ Where an officer justifies under a writ of attachment or execution, the plea need not recite the writ in full, but it should state the nature of the writ, the court from whence it issued, the commands of the writ, and what he has done under the writ, and that the

¹ *Stephens v. Hallstead*, 58 Cal. 193.

² *Hall v. Jenness*, 6 Kan. 356.

³ *Dayton v. Fry*, 29 Ill. 525.

⁴ *Booth v. Ableman*, 20 Wis. 21.

⁵ *Stringer v. Davis*, 35 Cal. 25.

⁶ *Herley v. Hume*, 5 T. B. Mon. (Ky.) 181.

property levied on was property he was authorized to levy on under the command of the writ. These allegations are necessary, that the court may determine the validity of his defense.¹ It has been held that he must show an indebtedness due to the plaintiff in the original process.² Where the defendant is an officer, and he wishes a return, he must plead a valid execution and judgment, and prove them.³ And it must allege that the writ was in full force and valid, and the property was taken according to the command thereof.⁴

§ 760. **If the officer did not take the property from defendant, must allege that it was his.** A plea of justification to an action of replevin against an officer for seizing the property on execution, if the property was not in the possession of the defendant in execution when taken, must aver that it was the property of the execution defendant.⁵ Where defendant justified as sheriff under an attachment against the property of B., and alleged that the goods in dispute at the time of the levy belonged to B. & P., he was entitled under this answer to attack at the trial the validity of a sale by B. & P. of the property to the plaintiff in replevin made before the levy.⁶

§ 761. **Matter of inducement in plea is not traversable.** Where a plea in an action of replevin sets up an execution

¹ Richardson v. Smith, 29 Cal. 529; McCarty v. Gage, 3 Wis. 404; Parsley v. Huston, 3 Blackf. 348; Whittington v. Dearing, 3 J. J. Marsh (Ky.), 684; Dillon v. Wright, 4 J. J. Marsh (Ky.), 254; Wheeler v. McCorristen, 24 Ill. 42; Van Namee v. Bradley, 69 Ill. 301; Mount Carbon Coal Company v. Andrews, 53 Ill. 185; Smith v. Winston, 10 Mo. 301; Gentry v. Borgis, 6 Blackf. 262; Adams v. Hubbard, 30 Mich. 104; Buck v. Colbath, 3 Wall. 242, 334.

² O'Conner v. Union Line, 31 Line. 230; Sanford Manufacturing Company v. Wiggins, 14 N. H. 441; Goodrich v. Fritz, 4 Ark. 525; McDonald v. Prescott, 2 Nev. 109; Hazzard v. Benton, 4 Har. (Del.) 62; Shearick v. Huber, 6 Binns (Pa.), 4; Damon v. Bryant, 2 Pick. 413.

³ Glascock v. Nave, 15 Harrison (Ind.), 458; Beach v. Botsford, 1 Doug. (Mich.) 206; Sandeford v. Hess, 1 Head. (Tenn.) 679; Clay v. Coperton, 1 T. B. Mon. (Ky) 10.

⁴ Dayton v. Fry, 29 Ill. 526.

⁵ Smith v. Winston, 10 Mo. 299.

⁶ Blakeslee v. Rossman, 44 Wis. 553; Marlin v. Watson, 8 Wis. 315.

against a third party, and a levy by the defendant, as an officer, of such execution upon the goods in dispute as the property of such third party, and avers that the goods in dispute were the property of such third party, and were not the property of the plaintiff, the averments as to the execution and levy are mere matters of inducement, which may be treated as surplusage, and still the plea would present a good defense to the action. By a general demurrer to such a plea, the plaintiff confesses that the goods in question are not his, as claimed in his declaration, but are the goods of another, and that being so, the action cannot be maintained, and it is unimportant whether the defendant, as to the one confessed to be the owner, has a lawful right to meddle with the goods or not.¹

§ 762. **By officer, what answer should be. In case of fraud, what.** Where an officer justifies under a writ, special property in himself or in the plaintiff in the execution, he ought also to traverse the right of property in the plaintiff. And when he desires to attack plaintiff's title for fraud, he should also plead the facts which put plaintiff in execution in position to take advantage of the fraud.² Where a defendant answered that he was constable, and as such had levied executions on the property in question as the property of an execution defendant, but there was no averment that the property belonged to such execution defendant, nor that it was subject to levy on such executions, *held*, on demurrer, that the answer is bad.³

§ 763. **Defendant may plead as many separate defenses as he may have**, and it is not necessary that these defenses be consistent with each other. Each defense should be fully and completely stated without reference to any other defense, and should be consistent with itself. Since the statute of 4 Anne, Ch. 16 (in 1706), the approved doctrine has been that

¹ *Lamping v. Payne*, 83 Ill. 463.

² *Schermerhorn v. Mitchell*, 15 Bradw. (Ill.) 418.

³ *Olds v. Andrews*, 66 Ind. 147. See *Fordyce v. Pipher*, 84 Ind. 86.

a state of facts admitted in one plea can not be taken as evidence of those facts if denied in another plea.¹ If tenants in common join or are joined in a suit, they may plead jointly, but if each proceed for his own interest, each must avow for himself.² If on the trial he establish any one of these several defenses, it is sufficient. He can offer proof on all or any one alone.³ An answer of a defendant in replevin may deny plaintiff's title and right to possession and also claim title in defendant as an officer under a writ. Such defenses are not inconsistent, and may be pleaded together.⁴

§ 764. **All defenses must be with reference to the time the suit was commenced.** A plea claiming title at a time prior to the commencement of the suit is bad as raising no issue.⁵

§ 765. **Where there are several defendants, each may plead separately as many proper defenses as he may have, without regard to what his co-defendants plead.⁶ All may plead property in one alone.⁷ If they all claim a joint right and a return to their joint possession, they must claim that possession by the same right.⁸**

§ 766. **How far court may control defendant's pleading.** The court cannot compel defendant to strike out of his answer a claim for a return of part of the property, even though plaintiff does not claim it, when it was taken on the writ.⁹ The court may compel a more specific statement of a

¹ *Edmonds v. Groves*, 2 Mees. & W. 642; *Gaines v. Tibbs*, 6 Dana, 147; *Shuter v. Page*, 11 Johns. 196; *Parsley v. Huston*, 3 Blackf. 348; *Whitwell v. Wells*, 24 Pick. 27; *Simpson v. McFarland*, 18 Pick. 432; *Harwood v. Smethurst*, 5 Dutch. (29 N. J.) 195; *Edelen v. Thompson*, 2 Har. & G. (Md.) 32.

² *Talvande v. Cripps*, 3 McCord (S. C.), 147.

³ *Mt. Carbon, &c., v. Andrews*, 53 Ill. 184; *Amos v. Sinnott*, 4 Scam. 441; *Rogers v. Arnold*, 12 Wend. 34; *Chambers v. Hunt*, 18 N. J. 639.

⁴ *Williams v. Eikenberry*, 22 Neb. 211 (34 N. W. 373).

⁵ *Patton v. Hammer*, 28 Ala. 618.

⁶ *Boyd v. McAdams*, 16 Ill. 146; *Martin v. Ray*, 1 Blackf. 291.

⁷ *White v. Lloyd*, 3 Blackf. 390. See *Gotloff v. Henry*, 14 Ill. 384.

⁸ *Gaines v. Tibbs*, 6 Dana (Ky.), 144.

⁹ *Howell v. Foster*, 65 Cal. 169.

defense in a replevin action.¹ It is error for the court to strike out part of defendant's answer, though the defenses may seem to be inconsistent.² More than one defense may be set up in an action in replevin, as well as in an action on a bond or debt.³ It is not error for the court to strike from an answer averments that could be proven under a general denial, which was one ground of defense set up in the answer.⁴ A party is not prejudiced by striking out a portion of his answer, when the same defense is set up in another part of his answer, which is allowed to stand.⁵

§ 767. **Effect of plea of property in defendant.** Where defendant pleads title and right of property in himself, it is always *held* a sufficient denial of plaintiff's claim. Plea of "property in defendant" is a claim of everything, and puts the plaintiff on proof of his right to it.⁶ Property in defendant may be pleaded after an avowry.⁷ In replevin a plea of property in a stranger or in defendant is good.⁸ Under an issue upon a general plea of property in the defendant, in an action of replevin, the defendant may show any legal title to the property, no matter how derived.⁹ In replevin the first plea was of property in S. P., the second that the defendant took the goods as constable by virtue of an execution against S. P., and that the goods belonged to S. P. *Held*, that the second plea might be rejected, as it was substantially the same as the first, and amounted to a plea of property in a stranger.¹⁰ An allegation in an answer in replevin that

¹ *Cunard v. Francklyn*, 111 N. Y. 511 (19 N. E. 92).

² *McDonald v. Prescott*, 2 Neb. 109.

³ *Holton v. Lewis*, 1 McCord (S. C.), 17.

⁴ *Auld v. Kimberlin*, 7 Kan. 601.

⁵ *Van Horn v. Overman*, 75 Iowa, 421 (39 N. W. 679).

⁶ *McIlvaine v. Holland*, 5 Harr. (Del.) 10.

⁷ *Hellings v. Wright*, 14 Pa. St. 373.

⁸ *Ingraham v. Mead*, 1 Hill (N. Y.), 353; *Harrison v. McIntosh*, 1 Johns. (N. Y.) 380; *Chambers v. Hunt*, 18 N. J. Laws (3 Harr.) 339; *Hall v. Hinlene*, 9 Ind. 256; *Martin v. Ray*, 1 Blackf. (Ind.) 291; *Edwards v. McCurdy*, 13 Ill. 496; *Dermott v. Wallach*, 1 Black, 96.

⁹ *O'Conner v. Union Line*, 31 Ill. 230.

¹⁰ *Mains v. Perkins*, 4 Blackf. (Ind.) 271.

the defendant "is rightfully entitled to the property and to "the possession thereof," following a denial of all the averments of the petition, is cumulative, and does not require a denial.¹ A mere denial by a defendant of the facts stated by plaintiff in his petition is not an assertion of ownership in defendant.² If a defendant in replevin plead property in himself or another, the place of taking the goods is not material.³

§ 768. **Plea of property in a third person is good.** In replevin for the wrongful taking and detention of personal property, if the defendant plead only property in third persons, the taking and detention of the property will be admitted.⁴ As a matter of pleading in actions of replevin, an answer of title in a third person is good without any allegations connecting defendant with the right of such third person.⁵ A plea of property in the defendant or in a stranger must traverse the right of the plaintiff.⁶ A defendant alleged that the property replevied belonged to his minor son, that he, as natural guardian, was bound to keep the custody of it, and that his son was fraudulently inveigled by the plaintiff to part with the possession of it. *Held*, that the last averment was surplusage, the plea being good without it.⁷ Title in a third person is a good defense in replevin, but defendant is not entitled upon such a plea, coupled with a disclaimer of interest in the property, to a dismissal of the suit.⁸ In replevin the pleas of *non cepit* and *non detinet* concede the right of property to be in the plaintiff, and only put in issue its caption and detention. The plea of property in a third

¹ Hunt v. Bennett, 4 Greene (Iowa), 512.

² Peters v. Parsons, 18 Neb. 191 (24 N. W. 687).

³ Emmett v. Briggs, 21 N. J. L. (1 Zab.), 53.

⁴ Kern v. Potter, 71 Ill. 19; Krause v. Curtis, 73 Ill. 450.

⁵ Ingraham v. Hammond, 1 Hill (N. Y.), 353; Patterson v. Adams, Hill & Denio (N. Y.), 428; Wright v. Bennett, 3 Barb. 456; McKnight v. Dunlap, 4 Barb. 41; Rockwell v. Saunders, 19 Barb. 481.

⁶ Rogers v. Arnold, 12 Wend. (N. Y.) 30.

⁷ Bliss v. Badger, 36 Vt. 338.

⁸ Choen v. Porter, 66 Ind. 194.

person puts in issue the plaintiff's right to the property, the allegation of property in another being merely inducement to the traverse of the plaintiff's right. Property in defendant or in a third person, sufficient to sustain a defense under such pleas, must be such as goes to destroy the interest of the plaintiff, which, if existing, would sustain the action, or, in other words, such as would defeat an action of trespass if brought in place of this action in case of a wrongful taking, or trover if brought for a wrongful detention.¹

§ 769. **A plea in bar is a good answer.** An answer setting up a former judgment in replevin between same parties for same property, is a good defense.² An answer pleading in bar another suit in replevin between the same parties concerning the same property must allege that the first action was decided upon its merits.³

§ 770. **Jurisdiction—Plea in abatement.** In replevin a plea in abatement raising a question of jurisdiction may be made by answer.⁴ A plea that plaintiff was *non compos mentis* presents matter in abatement only.⁵

§ 771. **Illustrations of sufficient answer.** The answer denied "that at the time stated in the complaint or at any other time the property described in the complaint came into defendant's possession, or that the same was or remained in his possession at the commencement of this action, as alleged in said complaint." *Held*, a sufficient answer.⁶ In an action of replevin an allegation by the defendant that he purchased the property in controversy of a third party is a sufficient denial of plaintiff's allegation of ownership.⁷ Requisites and sufficiency of the answer determined

¹ Van Namee v. Bradley, 69 Ill. 299; Johnson v. Howe, 2 Gilm. 342; Vose v. Hart, 12 Ill. 378; Warner v. Matthews, 18 Ill. 86; Bourk v. Riggs, 38 Ill. 320; Chandler v. Lincoln, 52 Ill. 74.

² Malony v. Griffin, 15 Ind. 213.

³ Terryll v. Bailey, 27 Minn. 304 (7 N. W. 261).

⁴ Thompson v. Bronson, 17 Mo. App. 456.

⁵ Jetton v. Smead, 29 Ark. 372.

⁶ Roberts v. Johannas, 41 Wis. 616.

⁷ Litchfield v. Halligan, 48 Iowa, 126.

in cases depending upon particular facts.¹ An answer in replevin containing an allegation that the property was not unlawfully detained by the defendant, nor was plaintiff entitled to the immediate possession thereof, states a defense and is not demurrable.² An answer in replevin for wheat which sets up that plaintiff's title was by an executory contract, and that there had been no delivery, alleges a good defense.³ A plea that the goods had been distrained for taxes is good, either in abatement or bar.⁴ An answer in an action of claim and delivery, which denies the ownership of the plaintiff, is not obnoxious on a general demurrer.⁵

§ 772. **Replevin by a mortgagee—Defense.** An answer which sets forth that the title of plaintiff is as administrator of a mortgagee, and that such mortgage was made with intent to defraud creditors, and setting forth facts constituting fraud, and alleging that defendant had purchased the goods at a constable's execution sale, is good.⁶

§ 773. **Plea of payment—No recovery for over-payment.** In an action in replevin an answer was filed alleging in detail purchase by installments, and over-payments, and demanding judgment for the amount over-paid. *Held*, on demurrer, that the answer was good as showing title in the defendant, but that he can not recover for the over-payment.⁷

§ 774. **Answers defective in substance—Examples.** In Indiana an answer that the defendant is entitled to the possession is bad. It should set out the grounds of his right.⁸ In replevin a plea alleging that the defendant was not in the possession of the property, nor claimed to own it at the time

¹ Bartlett v. Brickett, 98 Mass. 521; Stickney v. Smith, 5 Minn. 486; Blackman v. Wheaton, 13 Minn. 326.

² B. & M. R. R. v. Young Bear, 18 Neb. 494 (25 N. W. 729).

³ Dixon v. Duke, 85 Ind. 434; Benjamin on Sales, § 675, *note*.

⁴ Deshler v. Dodge, 16 How. 622.

⁵ Laughlin v. Thompson, 76 Cal. 287.

⁶ McFadden, Admr., v. Fritz, 90 Ind. 590.

⁷ Baldwin v. Burrows, 95 Ind. 81.

⁸ McTaggart v. Rose, 14 Ind. 230.

it was replevied, is bad in substance.¹ A took and converted the mule of plaintiff and sold it to B. Plaintiff brought replevin in the *detinet* against B and recovered, and then sued A for the trespass, to which A pleaded former recovery. *Held*, on demurrer, that the plea was not good, the original taking by A and the detention by B being separate causes of action.² In replevin against a sheriff for property attached by him, a plea of payment to the plaintiff in the suit subsequent to the attachment, without notice to the sheriff or an averment of discontinuance, is bad.³

§ 775. **Special pleas—Incomplete defenses—Sufficient answer.** The right of the plaintiff can only be put in issue by formally traversing his allegation of title, or by specially pleading that the right of property is in some other person than the plaintiff. No issues in replevin can be raised by conjunctive and literal denials.⁴ In replevin, where the real issue is the ownership of the property, a plea that properly tenders that issue is a proper and sufficient plea, and the fact that another good plea tendering the same issue was filed would not render bad the first plea. Special pleas are proper in replevin, and should not be stricken out.⁵ An answer pleaded to the whole complaint, but which does not answer all the paragraphs of the complaint, is bad.⁶

§ 776. **Contradictory defenses.** Where the defendant files an answer containing a general denial and six subsequent defenses, in which he admits the ownership of plaintiff, and that defendant detains the same from the plaintiff, *held*, that the general denial can only be considered as a denial

¹ Sayward v. Warren, 27 Me. 453.

² McGee v. Overby, 12 Ark. 164.

³ Livingston v. Smith, 5 Pet. 90.

⁴ Moser v. Jenkins, 5 Ore. 447.

⁵ Glenn v. Brush, 3 Col. 26. See Hunt v. Chambers, 21 N. Y. 620, Anderson v. Talcot, 1 Gil. 365; Rogers v. Arnold, 12 Wend. 30; The Mount Carbon, &c., Company v. Andrews, 53 Ill. 176; Dayton v. Fry, 29 Ill. 525; Chandler v. Lincoln, 52 Ill. 74.

⁶ Keller v. Boatman, 49 Ind. 104; Smith v. Little, 67 Ind. 549.

that plaintiff is entitled to the *immediate possession* of the property, and that defendant *wrongfully* detains the same from plaintiff.¹

§ 777. **Defendant cannot anticipate special title not pleaded by plaintiff.** Where plaintiff does not disclose the source or character of the title under which he claims in his pleadings, the defendant cannot be expected to set up matter in avoidance of a chattel mortgage under which plaintiff claims. In a case of this kind it becomes necessary in furtherance of justice to allow defendant to prove matter in avoidance without having pleaded it.²

§ 778. **Under a general denial defendant cannot show that some of the property died in his hands, but without his fault, between the commencement of the action and the trial.**³

§ 779. **A special property interest cannot be shown under a general denial.** Under a general denial in replevin a defendant may show absolute title in himself or a third party, but not a special property as, a lien on stock for their feed. This must be pleaded if relied on.⁴ Where a defendant sets up a special agreement as a defense, the plea must set out the terms of the agreement with certainty and precision; otherwise, the plea will be held bad.⁵

§ 780. **Usury should be specially pleaded.** Where the defense is usury, it should be specially pleaded, and if not between the parties to the usurious transaction, the circumstances which enable the pleader to take advantage of it should also be pleaded.⁶

¹ Yandle v. Crane, 13 Kan. 344.

² Hewitt v. Morris, 37 N. Y. Sup. Ct. 18.

³ Blaker v. Sands, 29 Kan. 551.

⁴ Guille v. Wong Fook, 13 Ore. 577 (11 P. 277). In this case, when demand was made before action brought, defendant claimed to own the property. See Pomeroy's Rem., § 703, and cases cited.

⁵ Curtis v. Jones, 3 Denio (N. Y.), 590. In this case plaintiff claimed by virtue of a mechanic's lien. Defendant claimed a special agreement by which no lien was to be had in favor of plaintiff.

⁶ Dix v. Van Wyck, 2 Hill, 522.

§ 781. **Fraud should be specially pleaded.** When the officer wishes to contest the title of plaintiff as fraudulent as to creditors whose process he holds, the fraud should be specially pleaded.¹

§ 782. **Answer need not claim a return** of the property in replevin,² but if the plaintiff has obtained possession, the answer should set up the change of possession, that there may be averments upon which a proper judgment may be based.³ In an action for the recovery of personal property, where the property has been delivered to plaintiff under proceedings in the action, it is not necessary, in order to entitle defendant to a return, that he should allege affirmatively that he or a third person is entitled to the possession of the property. The general denial, if the plaintiff fail to prove his averments, determines that the property should be restored to the defendant, but the court, in the exercise of its equity jurisdiction, may refuse to direct a return in the interest of justice. A defendant is not entitled to a return unless he demand it in his answer, but the answer may be amended after trial so as to ask for a return.⁴ A cross complaint or answer specially praying a return of the property to the defendant is not necessary to entitle defendant to a judgment of return, the general denial being sufficient.⁵ It is not necessary for a defendant in replevin to claim special damage for the taking and detaining of his property in order to recover them.⁶

¹ *Frisbee v. Langworthy*, 11 Wis. 375.

² *Matlock v. Straughn*, 21 Ind. 128.

³ *Gould v. Scannell*, 13 Cal. 430.

⁴ *Pico v. Pico*, 56 Cal. 453.

⁵ *Williams v. Kessler*, 82 Ind. 183.

⁶ *Woodruff v. Cook*, 25 Barb. (N. Y.) 505.

CHAPTER XXVIII.

DEFENSES.

	Section.		Section.
Defenses generally	783	Estoppel—Waiver	799
Plaintiff must show right of possession against the world	784	The effect of death of one of the parties does not abate the suit	800
Title in a third party is a good defense	785	Where a contrary doctrine has been held, it is under a statutory enactment . . .	801
Outstanding title in third person, when available . .	786	Where one of two defendants dies, does not abate . . .	802
General rule as to availability of such a defense . . .	787	Justification under a writ is a good defense	803
It is no defense that the goods are subject to a prior mortgage	788	Justification—How pleaded and proved	804
Where the statutes provide that claimants shall be made parties, a contrary rule has been laid down .	789	An officer from whom attached property is replevied cannot urge informal defects as a defense . . .	805
Remedy by intervention not exclusive	790	A valid judgment must be alleged in case of a levy by execution	806
Recoupment and set-off not allowed in replevin . . .	791	A <i>fi fa</i> is a good defense by an officer, but not by plaintiff in execution	807
A tort cannot be justified by a set-off	792	Trial of the right of property and judgment in favor of the officer is a good defense	808
Rule in case of a chattel mortgage—Usury a good defense	793	The pendency of another action involving the same question is a good defense .	809
Courts should give the action such flexibility as to do justice, where possible . .	794	It must be a final judgment on the same issue	810
An off-set may be pleaded against the damages . . .	795	Where defendant pleads a former adjudication, he must show all the facts . .	811
Any defense interposed must have relation to the commencement of the action .	796	A judgment on other issues is no defense	812
Defense cannot be changed after suit brought . . .	797		
Failure of plaintiff's title after action brought is no defense	798		

Section.	Section.
What plea in abatement must contain to be a valid defense . . . 813	What are proper defenses—
When plea in abatement proper—Examples . . . 814	Examples 825
A special right of possession is a good defense . . . 815	A defense based on a special law must show full compliance with that law . . . 826
A lien in a third person no defense 816	Defenses proper in case of a distress 827
Title acquired by possession alone may be a good defense 817	Defense is waived if not taken advantage of in time . . . 828
A tax warrant is a good defense 818	Improper defense—Examples . . . 829
Title acquired from plaintiff is a good defense . . . 819	Destruction by "act of God" not a good defense . . . 830
A judgment in trover for the conversion 820	Death of the property may be shown in mitigation of damages 831
A claim of title in defendant is a good defense . . . 821	Taking by a soldier in time of war, no defense 832
That the property is not identical is a good defense . . 822	Garnishment is no defense . . . 833
Statute of frauds—Who can plead it 823	Purchase in market Over—Or at public sale no defense . . 834
Fraud as a defense must be specially pleaded . . . 824	Right of homestead—No defense against replevin by a mortgagee 835
	A prior foreclosure in chancery is a good defense . . . 836

§ 783. **Defenses generally.** Any defense which controverts plaintiff's right of possession at the time the suit was commenced is allowable, and if the question raised by plaintiff is one of title, any defense that shows title in some one else is proper. Anything going to show that the plaintiff had no right to the possession when he commenced his suit is a complete bar to the action, as that the defendant lawfully held the property as against the plaintiff by virtue of a prior writ of replevin.¹ Several defenses may be pleaded by defendant at the same time.² All the defenses set up by defendant must be passed upon.³

¹ *Belden v. Laing*, 8 Mich. 500.

² *Martin v. Ray*, 1 Blackf. (Ind.) 291. This is the better doctrine, though a contrary rule was held in *Vaiden v. Bell*, 3 Rand. (Va.), 448.

³ *Sprague v. Kneeland*, 12 Wend. (N. Y.) 161.

§ 784. **Plaintiff must show right of possession against the world.** Title in a third person is a good defense.¹ Plaintiff in replevin, claiming title in himself, must make title against the world, as on such an issue a general denial puts in issue the right on which plaintiff bases his writ.² A general denial in replevin puts in issue the title and right of possession of plaintiff, and under such general denial defendant may prove title or right of possession either in himself or in a stranger, or may in any other manner controvert plaintiff's title or right of possession, or he may show that he himself never had the possession, actual or constructive.³ A plaintiff in replevin must stand on his title, and any defense going to impeach his title is proper. Where plaintiff claims to own goods levied on in execution against a third person, it may be shown that plaintiff's title is founded in fraud in fact or fraud in law, and plaintiff can not go back of the judgment on which the execution was issued and question the consideration on which it was based.⁴ In replevin, under the plea of property, the defendant is at liberty to show either a general or special property in himself. The plea of property imposes upon the plaintiff the necessity of establishing his title and the right of exclusive possession.⁵

§ 785. **Title in a third party is a good defense.** Where the property belongs to a third party, the plaintiff cannot recover; and if the property has been taken from the defendant, there must be judgment for its return.⁶ Anything going to show that the plaintiff in replevin had no right to the possession when he commenced his suit is a complete bar to the action.⁷ Defendant, under a mere general denial, may show that plaintiff has not the title or right of posses-

¹ *Sutro v. Hoile*, 2 Neb. 186.

² *School District v. Shoemaker*, 5 Neb. 36.

³ *Timp v. Dockham*, 32 Wis. 147.

⁴ *Hotchkiss v. Ashley*, 44 Vt. 195.

⁵ *Mathias v. Sellers*, 86 Pa. 486.

⁶ *Collier v. Yearwood*, 5 Bax. (Tenn.) 581.

⁷ *Clark v. West*, 23 Mich. 242; *Belden v. Laing*, 8 Mich. 500.

sion, and to that end may prove title in himself or a stranger. Where defendant in such a case has shown that he had rightful possession under a third person, the fact that, without authority from the owner, he has given a bill of sale of the chattels to the plaintiff, will not defeat his right of possession as against the latter; and the purpose for which he gave such bill of sale is immaterial.¹ A sole defendant in replevin may set up as a defense a lien upon the property replevied in favor of the firm of which defendant is a member for work done by the firm on the property sought to be replevied.²

§ 786. **Outstanding title in third person, when available.** In an action of detinue defendant cannot set up an outstanding title in a third person without connecting himself with it.³ A purchaser of a sewing machine from one in possession, but without title, cannot defeat a recovery by the owner unless he shows a *bona fide* purchase for valuable consideration without notice.⁴ In replevin the plaintiff may recover against a mere trespasser by showing possession only, and the defendant cannot set up an outstanding title in a third person with which he does not connect himself. But where the plaintiff did not have possession, but bases his right of recovery on his legal title, the defendant may set up an outstanding title in a third person without connecting himself with it. It is enough that the plaintiff has no title.⁵ Property in himself or in a stranger is a good defense. It is not necessary that defendant should connect himself with the title of the stranger. It is sufficient for him that the right of property is not in the plaintiff. The

¹ Delaney v. Canning, 52 Wis. 266 (8 N. W. 897).

² Holderman v. Manier, 104 Ind. 118 (3 N. E. 811).

³ Gafford v. Stearns, 51 Ala. 434; Sims v. Boynton, 32 Ala. 353.

⁴ Sumner v. Woods, 52 Ala. 94.

⁵ McIntosh v. Parker, 82 Ala. 238; Jackson v. Rutherford, 73 Ala. 156; Russell v. Walker, 73 Ala. 315; Foster v. Chamberlain, 41 Ala. 158.

plaintiff must recover on the strength of his own title.¹ In New York a defendant in replevin may interpose a claim of property in the thing of which deliverance is sought, although he be not the possessor thereof.² A defendant in replevin is not estopped from setting up title in B when the plaintiff has loaned to A the property replevied, which A has subsequently exchanged with defendant.³ The defense that the property belonged to a third party, and was taken by legal process against him in replevin, is admissible under the general issue without notice.⁴ One in the sole and peaceable possession of goods, not as an intruder, trespasser, or wrongdoer, but as the owner, either of the whole or some special property in them, has a valid title as against all mere strangers, which they cannot defeat by showing an outstanding title in some third party.⁵ A defendant who has wrongfully taken possession of the property cannot set up as a defense that other persons who are not defendants have a lien on the property which entitles them to its possession.⁶

§ 787. **General rule as to availability of such a defense.** While as a general rule a defendant in replevin is permitted to show title in a third party at the date of the institution of the suit,⁷ there are some exceptions to this rule, and the title in a third party, to be available as a defense, must be such a title as to entitle such third party to the possession at the commencement of the suit; and where the action was based upon a forfeited chattel mortgage, executed by the defendant, he cannot set up as a defense that

¹ *Spores v. Boggs*, 6 Ore. 122; *Edwards v. Talcott*, 1 Gilman, 365.

² *Mitchell v. Hinman*, 8 Wend. (N. Y.) 667.

³ *McFerrin v. Percy*, 1 Sneed, (Tenn.), 314.

⁴ *Snook v. Davis*, 6 Mich. 156.

⁵ *Van Baalen v. Dean*, 27 Mich. 104.

⁶ *Laughlin v. Thompson*, 76 Cal. 287. In this case defendant was an officer, and the court say either held under a writ which protected him or else he was a trespasser—somebody else's title was of no advantage to him.

⁷ *Sterm v. Mason*, 16 Mo. App. 473; *Young v. Glasscock*, 79 Mo. 575.

a third person holds a better title than that of the plaintiff by reason of a prior mortgage delivered to such third person by the defendant—thus implying a breach of his own warranty of the plaintiff's title—and especially when it does not appear that the condition of such prior mortgage has been broken.¹

§ 788. It is no defense that the goods are subject to a prior mortgage if the prior mortgage provides that the mortgagor may remain in possession until breach of condition, and there is no evidence that the prior mortgagee has made any claim upon the mortgagor.² It is no defense to an action of replevin by a mortgagee that a suit for the foreclosure of the mortgage between the same parties is already pending, as this does not affect the right to possession.³ In an action by a mortgagee to obtain possession of the chattels, as against another mortgagee thereof, he must show default in his mortgage, or such a state of facts as, under it, will entitle him to the possession.⁴

§ 789. Where the statutes provide that claimants shall be made parties, a contrary rule has been laid down. Title in a third person, not a party to the action, cannot be shown in defense to a suit in replevin. Such third person should be made a party.⁵ A defendant in replevin cannot assert the right of a third person to a lien on the property as a bar to the plaintiff's right to possession.⁶ Where defendant disclaimed title in himself, alleging that plaintiff's wife was the owner, and that he was her bailee, and the wife thereupon petitioned to intervene and be made a party, *held*,

¹ *Gottschalk v. Klinger*, 33 Mo. App. 410; *Adams v. Wildes*, 107 Mass. 123.

² *Adams v. Wildes*, 107 Mass. 123.

³ *Lorch v. Aultman*, 75 Ind. 162.

⁴ *Madison National Bank v. Farmer*, 5 Dak. 282 (40 N. W. 345).

⁵ *Reed v. Reed*, 13 Iowa, 5; *Corbitt v. Hiesly*, 15 Iowa, 296; *McChing v. Bergfield*, 4 Minn. 148.

⁶ *McGill v. Howard*, 61 Miss. 411.

that she was entitled to be made a party defendant as a matter of right.¹

§ 790. **Remedy by intervention not exclusive.** Where the statute allows a claimant of property attached to intervene in the attachment suit, this remedy is not exclusive, and does not bar him of his right of replevin.²

§ 791. **Recoupment and set-off not allowed in replevin.** Accounts cannot be adjusted or settled in a replevin action.³ The action of replevin sounds in tort, and it cannot be turned into an equitable action for the adjustment of accounts between the parties, but where the claim of plaintiff is based on the fact that a certain sum is due him, it is permissible to show that nothing was due him, and consequently he had no right of possession. As in the case of replevin for wheat, defendant justified the detention on the ground that he had a lien as warehouseman for storage and care, and the plaintiff contended that by his neglect forty bushels of the wheat had been lost, and that this wheat was equal in value to the storage claimed. *Held*, a proper matter for investigation in replevin, and that the damage, if sufficient in amount, would extinguish the lien.⁴ Thus, where property is distrained for rent, the very foundation of the action is rent due. In such cases the tenant has been permitted to show any set-off or counter claim which would establish the fact that no rent was due.⁵ The practice of the courts has not been quite

¹ Carney v. Gleissmer, 62 Wis. 493 (22 N. W. 735).

² Wangler v. Franklin, 70 Mo. 659; Burgert v. Borchert, 59 Mo. 85. If final judgment on his inter-plea had been against him, it would probably have defeated him in a replevin action. Richardson v. Jones, 16 Mo. 177.

³ Whitworth v. Thomas, 83 Ala. 308 (3 So. 781); Otter v. Williams, 21 Ill. 120; Stow v. Yarwood, 14 Ill. 427; Keaggy v. Hite, 12 Ill. 101; Streeter v. Streeter, 43 Ill. 155; Chitty on Contracts, 1266-7; Waters on Set-off, 169.

⁴ Babb v. Talcott, 47 Mo. 343.

⁵ Lindley v. Miller, 67 Ill. 248; Fairman v. Fluck, 5 Watts, 516; Peck v. Brewer, 48 Ill. 55; Peterson v. Haight, 3 Whart. (Pa.) 150; Warner v. Caulk, 3 Whart. 193; Phillips v. Mouges, 4 Whart. 225.

uniform on this point. Where, by agreement, the tenant was to make improvements, and the landlord to allow for them at the end of the term, or to take them at a valuation, *held*, on replevin by the tenant after a distraint by the landlord, that the tenant could not set off the value of the improvements or damages for taking them.¹

§ 792. **A tort cannot be justified by a set-off.** While the justification of a tort by a set-off is not admissible generally, yet in the action of replevin to test the validity of a distress for rent, the issue presented as to the "unlawful taking" rests upon the fact whether the rent is or is not due, and the tenant may show any matter competent to discharge this liability.² In replevin the defendant cannot set off against the plaintiff's recovery a large indebtedness due to him for the goods in dispute.³ Set-off is not generally allowed in replevin,⁴ and generally such claims for recoupment must be closely confined to claims growing out of the same subject-matter.⁵ But a wrongful taker can never be allowed to set up an account to justify the taking.

§ 793. **Rule in case of chattel mortgage—Usury a good defense.** After default the mortgagee may bring replevin for the property as long as any part of the debt is unpaid. A partial payment pleaded as a set-off is no defense, but full payment is a good defense.⁶ In an action of claim and de-

¹ Warner v. Caulk, 3 Whart. (Pa.) 193; Peterson v. Haight, 3 Whart. (Pa.) 150.

² Bloodworth v. Stevens, 51 Miss. 475. In this case defendant seized cotton bales for rent due as per a contract. Plaintiff replevied, admitting the lease, and claiming that defendant (lessee) also agreed to repair a certain fence, by his failure to do which plaintiff was damaged by trespassing stock to more than the rent. He therefore owed no rent. *Held*, a proper issue under the circumstances.

³ Kilgore v. Smith, 122 Pa. 48 (15 A. 698).

⁴ Waterman on Set-off, 169; Kennett v. Fickel (Kan.), 21 P. 93.

⁵ Streeter v. Streeter, 43 Ill. 155; Sears v. Wingate, 3 Allen, 103. See *Salters v. Everett*, 20 Wend. 267; *Babcock v. Trice*, 18 Ill. 420; *Turner v. Retter*, 58 Ill. 265.

⁶ Hudson v. Snipes, 40 Ark. 75; Marks v. McGhee, 35 Ark. 218; Jones on Chattel Mortgages, § 706.

livery by a mortgagee of chattels for possession, the mortgagor may show usury in the contract as a defense.¹ In replevin against one representing the mortgagee, by one not claiming under the mortgagor, the question how much is due on the mortgage debt is immaterial.²

§ 794. **Courts should give the action such flexibility as to do justice where possible.** Set-off is not allowable in an action of replevin in the ordinary sense in which it is allowable in other forms of action, but damages growing out of the same subject matter may be considered in reducing the damages claimed or allowable in the replevin action.³ But courts are inclined to give the action such flexibility as to adjust all equities arising between the parties in such action.⁴ There is no set-off in replevin, but if the goods are subject to a charge, it can be enforced by way of recoupment.⁵

§ 795. **An off-set may be pleaded against the damages.** The right of defendant, in an action of claim and delivery, to damages for the taking and detention in the pending action, is not, in itself, a cause of action in the defendant. It is not something upon which he can maintain an action; it is merely a right given him by statute, to be asserted in the action out of which it arises.⁶ A defendant in a replevin suit may plead a counter claim as a defense and as an off-set to the damages.⁷ The subject matter of litigation in replevin is the property mentioned in the complaint, and the defendant cannot claim the release and return of other and distinct personal property, even though he present such a

¹ Moore v. Woodward, 83 N. C. 531. See Tyler on Usury, 433-4.

² Kløety v. Delles, 45 Wis. 484.

³ Workman v. Warder, 28 Mo. App. 1; Babb v. Talcott, 47 Mo. 343; Peterson v. Haight, 3 Whart. (Pa.) 150; Phillips v. Monges, 4 Whart. (Pa.) 226; Fairman v. Fluck, 5 Watts, 516; McIntyre v. Eastman, 76 Iowa, 455 (41 N. W. 161).

⁴ Hickman v. Dill, 32 Mo. App. 509; Boutelle v. Warne, 62 Mo. 350; Barney v. Brannon, 51 Conn. 175.

⁵ Macky v. Dillinger, 73 Pa. 85.

⁶ Sylte v. Nelson, 26 Minn. 105.

⁷ Morgan v. Spangler, 20 Ohio St. 38.

case as would have enabled him to recover in an independent action.¹

§ 796. Any defense interposed must have relation to the commencement of the action and the right to possession at that time, or it is not germane to the issue involved, and no act of either party, after the commencement of the action, can work to the detriment of the other party. It is a good defense to an action of replevin that, at the time the writ was issued, defendant did not detain the property, though caught in temporary possession afterwards.² It is no defense to an action by possessory warrant against a receiver that, since the commencement of the action, his receivership has been vacated, and he has delivered the property over to the party from whom he took it as such receiver. If he so surrendered it, he did it at his peril.³ Plaintiff's right to proceed to final trial and judgment in a replevin action cannot be defeated by an assignment of the property for the benefit of creditors after the commencement of the action and before the service of the order of delivery. It is the status of the property at the commencement of the action that must govern; nothing that the defendant can do after the commencement of the action can change plaintiff's rights.⁴ Payment, pending an action, of part of the claim does not deprive plaintiff of his right to recover the remainder; the part paid only goes in mitigation of damages.⁵ In replevin by a mortgagee to recover possession of the mortgaged chattels,

¹ *Lovensohn v. Ward*, 45 Cal. 8.

² *Burt v. Burt*, 41 Mich. 82. So held in a case growing out of a family fuss.

³ *Peacock v. Pittsburg, &c.*, 52 Ga. 47.

⁴ *Collier v. Beckley*, 33 Ohio St. 523. See also *Burnley v. Lambert*, 1 Wash. 403; *Lynch v. Thomas*, 3 Leigh. (Va.) 682; *Jones v. Dowle*, 9 Mees. & Welsby, 18; *Garth v. Howard*, 5 C. & P. 346; *Nichols v. Michael*, 23 N. Y. 264; *Allen v. Crary*, 10 Wend. 349. In *Ramadell v. Buswell*, 54 Me. 546, where a contrary rule was held, the property had actually passed to the possession of the purchaser at the time the writ issued.

⁵ *Thomas v. Wisemann*, 44 Wis. 339.

the defendant cannot defeat the action by showing that a portion of the indebtedness was paid after action commenced.¹

§ 797. **Defense cannot be changed after suit brought.** Where a defendant claims the property by virtue of an attachment, he cannot after replevin claim by virtue of a carrier's lien which he had paid in order to get possession under his attachment.² The defendant in replevin must defend upon the specific ground taken by him when demand for possession was made.³ It is difficult to see how any tender after suit brought can avail the defendant; but if it can under any circumstances, it must be a tender followed up by bringing the money into court for the plaintiff's use.⁴

§ 798. **Failure of plaintiff's title after action brought is no defense.** The plaintiff's right of recovery is defeated by the passage of his title to another before the trial, unless the defendant is a mere trespasser, but not by its extinction on account of the destruction of the property, whether by death, emancipation, or otherwise.⁵

§ 799. **Estoppel waiver.** It is a good defense to an action in replevin that the property was levied on as the property of M. after being pointed out by J., the plaintiff in replevin, to the officer as the property of M.⁶ But where a person claims several liens and mentions one specially, he is not estopped from setting up the others as a defense, and declarations made by a bailee to a stranger that he would not surrender the property on full payment of his lien—does

¹ *Machette v. Wanless*, 1 Col. 225.

² *Keep v. Moore*, 11 Lea. (Tenn.) 285.

³ *Moore v. Ryan*, 31 Mo. App. 474; *Boardman v. Sill*, 1 Camp. 410.

⁴ *Roberts v. White*, 146 Mass. 256 (15 N. E. 568).

⁵ *Wilkerson v. McDougal*, 48 Ala. 517. This action was brought in 1852, for slaves, and lingered until 1869, when defendant pleaded the failure of plaintiff's title to the slaves by reason of their emancipation. See also *Cole v. Conoly*, 16 Ala. 271; *Dozier v. Joyce*, 8 Por. 303; *Ro e v. Pearson*, 41 Ala. 687; *McElvain v. Mudd*, 44 Ala. 48; *Young v. Pickens*, 45 Miss. 553.

⁶ *Hardin v. Joice*, 21 Kan. 318.

not dispense with the necessity of a tender of these charges by the owner before bringing suit.¹ A defendant in replevin who has prevented the delivery of the property to the plaintiff by attaching it upon a writ in his own favor cannot object to the prosecution of the replevin on the ground of such non-delivery.²

§ 800. **The effect of death of one of the parties to an action of replevin depends upon the statutes in regard to the survival of actions.** Replevin is governed by the same rule as other actions similarly situated, and ordinarily the death of a party does not abate the suit.³ Actions in replevin do not abate by the death of the parties, but their personal representatives may appear and carry on the actions.⁴ There is no good reason, except the positive command of a statute, why the death of a party to a replevin suit should prevent the determination of the question involved, and where such statutory enactments exist they should be construed strictly and their scope not enlarged. In many states which formerly followed the common law rule that death abated the action, a different rule has been adopted under the code.⁵

§ 801. **Where a contrary doctrine has been held it is under a statutory enactment.** Where a verdict was rendered in New York for a defendant in an action of replevin for part of the property in question, and a new trial ordered, and the defendant died after such order for new trial, and previous to the next term of the court, *held*, that the action could not be continued in the name of the executors.⁶ The death of the defendant abates the action, and it cannot be revived against the administrator.⁷

¹ *Brown v. Holms*, 21 Kan. 687.

² *Pomeroy v. Trimper*, 8 Allen (Mass.), 398.

³ *Reist v. Heilbrinner*, 11 Serg. & R. (Pa.) 131; *Jenney v. Jenney*, 14 Mass. 232; *Pitts v. Hale*, 3 Mass. 321; *Fister v. Beall*, 1 Har. & J. (Md.) 31.

⁴ *Fister v. Beall*, 1 Har. & J. (Md.) 31; *Keite v. Boyd*, 16 S. & R. 301; *Kenash v. Lane*, 21 Mo. 115.

⁵ *Roberts v. Marsen*, 23 Hun. (N. Y.) 486.

⁶ *Webber v. Underhill*, 19 Wend. (N. Y.) 447.

⁷ *Merritt v. Lumbert*, 8 Me. (8 Greenl.) 128; *Reestor v. Chevalier*, 1

§ 802. Where one of two defendants in replevin dies before a final result is reached, on a finding against plaintiff, a judgment of return to the survivor should be rendered.¹

§ 803. Justification under a writ is a good defense, and no mere informality in the writ or its service will detract from its force as a defense, provided the command of the writ has been substantially obeyed and the right property taken. In replevin, where defendant justified under a writ, it is of no avail to plaintiff that the description in that writ and the pleadings was meager, as "400 sheep."² Nor that the appraisement was of a cow when the writ called for a heifer.³ Nor that the writ called for a certain number of barrels of mackerel, and that half barrels enough to make up the quantity were taken instead of the whole barrels.⁴ Where a constable levied an attachment on Sunday, and on Monday an attachment in another suit, and had an *alias* order issued in the first suit and levied again, keeping possession all the time, and the attachment defendant brought replevin, alleging that the writs of attachment were not legally levied, *held*, that the validity could not be questioned in the replevin action.⁵

§ 804. Where the defense is justification under a writ, defendant must allege the property was the property of the defendant in the writ. A plea in abatement to an action of replevin for goods seized on process against a third person is insufficient if it merely allege that defendant seized them under a certain described execution, without also alleging that they were seized as the property of the defendant named therein, or as liable to seizure for his debt.⁶ In replevin,

Mo. 345; Mellen v. Baldwin, 4 Mass. 480; Miller v. Langton, Hart. (S. C.) 131; Burkle v. Luce, (N. Y.) 1 Comst. 163.

¹ Gaines v. Tibbs, 6 Dana, 145.

² Lawrence v. Coyne, 62 Cal. 124.

³ Pomeroy v. Trimper, 8 Allen (Mass.), 398.

⁴ Gardner v. Lane, 9 Allen (Mass.), 492.

⁵ Blair v. Shew, 24 Kan. 280.

⁶ Carew v. Matthews, 41 Mich. 576.

where an officer justifies under a writ of attachment, he must prove the judgment or the debt.¹ It is no defense to an action of replevin that plaintiff, as agent for another party, had attached the property now replevied, when the attachment was dismissed and property returned before the replevin suit was commenced.² It is a good defense to an action of replevin that the property was taken by the defendant by virtue of a writ of attachment in his hands as sheriff against a third party, who is the real owner.³ An officer may plead his writ of attachment and also property in the defendant in attachment.⁴ An officer is allowed more latitude than the owner in pleading. He may plead the general issue and give special matter in evidence without notice.⁵ In an action against an officer who has seized goods on attachment, he may question the *bona fides* of a prior sale by the attachment debtor to the plaintiff.⁶

§ 805. **An officer from whom attached property is replevied cannot urge informal defects as a defense.** In replevin against an officer for property attached by him, he cannot urge as a defense that the attachment was not yet completed.⁷ The officer from whom attached goods are replevied can only entitle himself to a return by showing property either in himself or in the debtor, as whose property they were attached. He cannot object that part of the property was taken in another county; and, therefore, the court has no power to render judgment for the plaintiff.⁸

§ 806. **A valid judgment must also be alleged in case of a levy by execution.** Where a sheriff justifies under an execution, and seeks to attack the title of the plaintiff in re-

¹ *Newton v. Brown*, 2 Utah, 126.

² *West Michigan Savings Bank v. Howard*, 52 Mich. 423 (18 N. W. 199).

³ *Wiler v. Manley*, 51 Ind. 169.

⁴ *Scott v. Hughes*, 9 B. Mon. (Ky.) 104.

⁵ *Coon v. Congden*, 12 Wend. (N. Y.) 496.

⁶ *Williams v. Morgan*, 50 Wis. 548 (7 N. W. 541.)

⁷ *Jackson v. Hubbard*, 36 Conn. 10.

⁸ *Hall v. Gilmore*, 40 Me. 578.

plevin on the ground of fraud, the plaintiff being a stranger to the judgment upon which the execution is based, the sheriff must show that his execution issued upon a valid subsisting judgment.¹ An execution upon an invalid judgment is no defense to an action of replevin by the purchaser from the judgment debtor.² An execution issued before judgment rendered is no protection to an officer, and on replevin for the property the fact that judgment has been rendered since the issuance of the execution is no defense.³ An officer, defendant in replevin, claiming under an execution, will fail if there is no valid existing judgment upon which the execution issued.⁴ But in the absence of a denial of the validity of the execution and judgment defendant is relieved from proving their validity.⁵ While an execution will protect an officer when proceeded against as a wrongdoer, it is no defense to an action of replevin unless it be founded upon a valid judgment. When the defendant in replevin relies upon an execution, the plaintiff may show that the judgment upon which it issued was void for want of jurisdiction.⁶ While an execution, fair on its face, is sufficient to protect an officer against personal responsibility in serving it, yet when he claims property under it he must show that it was warranted by judgment.⁷

§ 807. **A fi fa is a good defense by an officer, but not by plaintiff in execution.** He must go further, and not only show that it issued from the proper tribunal, but also a proper judgment upon which it could issue.⁸

¹ Wyatt v. Freeman, 4 Col. 14.

² Wilson v. Martin, 44 Mich. 509 (7 N. W. 83).

³ Campbell v. Williams, 39 Iowa, 646. In this case the justice claimed to have rendered judgment mentally, but did not enter it on the docket for some time after the execution was issued.

⁴ Bolen v. Nunn, 63 Iowa, 641 (19 N. W. 810).

⁵ Brock v. Barr, 70 Iowa, 400 (30 N. W. 652).

⁶ Adams v. Hubbard, 30 Mich. 104. See also Beach v. Botsford, 1 Doug. 199; Le Roy v. East Sag. Ry. 18 Mich. 233.

⁷ Gedday v. Witherspoon, 35 Mich. 368.

⁸ Clay v. Caperton, 1 T. B. Mon. (Ky.) 10.

§ 808. **Trial of the right of property and judgment in favor of the officer is a good defense.** Many of the states have a provision whereby the title to property claimed by third parties, while in the hands of the officer, may be tried on the motion of the officer or the claimant. This proceeding, usually called trial of the right of property, is in the nature of a replevin suit, and is intended as a protection to the officer. If the finding on this trial of the right of property be in favor of the officer, it is a good defense to any replevin action against him by the claimant. Where the statute provides that if property levied on is claimed by third parties, and notice is given, the officer may refuse to levy until an indemnity bond is given for the benefit of the claimant. It is held that where this is done it bars the claimant of the right of replevin against the officer.¹ A trial of the right of property will protect the officer, but it does not conclude the party whom the officer represents.² The verdict of a sheriff's jury, in trial of the right of property, is a bar to a subsequent action in replevin by this claimant against the sheriff for the recovery of the possession of the property.³ In replevin against an officer it is a good defense that the claimant had instituted proceedings for trial of right of property attached, as provided by statute in such cases, and on that trial the jury found against him and judgment rendered accordingly.⁴ In Indiana a different rule is followed by statute.⁵

§ 809. **The pendency of another action involving the same question is a good defense.** So is a judgment on the

¹ *Dodd v. Thomas*, 69 Mo. 364.

² *Hexter v. Schneider*, 14 Ore. 184 (12 P. 668); *Rowe v. Bowen*, 28 Ill. 116; *Fisher v. Gordon*, 8 Mo. 386; *Bagley v. Bolis*, 8 Johns. 185; *Crocker on Sheriffs*, § 446.

³ *Capital Lumber Company v. Hall*, 9 Ore. 93; *Remdell v. Swackhammer*, 8 Ore. 502; *Schroeder v. Clark*, 18 Mo. 184; *Patty v. Mansfield*, 8 Ohio, 370. See *Schell v. Husenstine*, 15 Neb. 9.

⁴ *Bray v. Seaman*, 13 Neb. 518 (14 N. W. 474).

⁵ *Chinn v. Russell*, 2 Blackf. (Ind.) 172.

same issue in another action. The pendency of another action in replevin for same property between same parties is a good defense.¹ A former adjudication is a good defense.² The pendency of a second suit in replevin may be pleaded in bar or abatement of the first replevin.³ It is a good defense by a sheriff to an action of replevin that he had taken the property in a former action of replevin, and delivered it to the plaintiff in the first action, and he cannot be held liable for the property, damages, or costs at the suit of the defendant in the first action. The remedy is against the plaintiff in that action.⁴

§ 810. **It must be a final judgment on the same issue.** It is no defense to an action of replevin that in another action of replevin by defendant against plaintiff to recover the same property a judgment of non-suit had been rendered against him. The only questions are whether the plaintiff is the owner and entitled to the possession of the property in question, and whether this defendant wrongfully withholds it from him.⁵ A discharge in insolvency is no defense to an action to recover the possession of personal property converted by the defendant.⁶ A ruling upon a motion in an attachment proceeding to discharge exempt property is no defense to a replevin action for the exempt property.⁷

§ 811. **Where defendant pleads a former adjudication, he must show all the facts necessary to enable the court to judge as to the identity of the two actions.**⁸ A defendant in replevin in Pennsylvania may, in defense, avail himself of a delivery to him pursuant to a writ of replevin issued out of a court of competent jurisdiction in another state, the liti-

¹ *Turner v. Reese*, 22 Kan. 319.

² *Malony v. Griffin*, 15 Ind. 213.

³ *Fisher v. Marquett*, 58 Mich. 450 (25 N. W. 460).

⁴ *Fleming v. Wells*, 65 Cal. 336 (4 P. 197).

⁵ *Fleming v. Hawley*, 65 Cal. 492 (4 P. 494).

⁶ *Wood v. McDonald*, 66 Cal. 546 (6 P. 452).

⁷ *Watson v. Jackson*, 24 Kan. 442.

⁸ *Armstrong v. McMellon*, 9 Mo. 721.

gants and the things delivered being subject to the law of the place of delivery.¹ Where in an action of replevin the defendant pleads former recovery of the same property from plaintiff, and the record he relies on does not describe the same property as the suit at bar, he may show by parol that in fact it was the same property.²

§ 812. **A judgment on other issues is no defense.** That defendant has been adjudged a bankrupt is no defense to an action of replevin.³ It is no defense to an action of replevin for a cow that the same party had formerly brought a replevin for the cow and mule and obtained the mule only, and then suffered that suit to go against him by default.⁴ A judgment for a defendant in a search warrant proceeding is no bar to an action of possessory warrant against him for the same property.⁵ A merchant, supposing that an insolvent customer to whom he had forwarded goods had received and appropriated them, made an affidavit as a creditor under the assignment, but the goods had not been received. *Held*, that the affidavit did not estop him from replevying them from the carrier.⁶

§ 813. **What plea in abatement must contain to be valid as a defense.** In a plea of abatement to a replevin action every allegation necessary to make out the case covered by it must be distinctly and not inferentially stated, and the plea must exclude all matters which, if alleged on the other side, would defeat it.⁷ It should also contain prayer for a return, but if the defendant is an officer holding under a writ, a return will be awarded whether asked for or not if the plea

¹ Lowry v. Hall, 2 Watts & S. (Pa.) 129.

² Gates v. Bennett, 33 Ark. 475; Anderson v. Mills' Exrs., 28 Ark. 184.

³ Miller v. Warden, 111 Pa. 300.

⁴ Poor v. Darrah, 5 Houst. (Del.) 394.

⁵ Claton v. Ganey, 63 Ga. 331.

⁶ Lentz v. Flint, &c., 53 Mich. 444 (19 N. W. 138).

⁷ Dubois v. Hutchinson, 40 Mich. 262; Belden v. Laing, 8 Mich. 500; 1 Chitty Plead. (16 Am. Ed.) 462 and 482 *et seq.*; 2 Green. Ev., "Abatement."

is sustained.¹ But it has been held that where a plea in abatement was sustained and the writ quashed, the defendant was not entitled to a return.² Objections to the sufficiency of the allegations in a plea of abatement should be raised by demurrer, and, if not made until after judgment, come too late to entitle them to consideration.³

§ 814. **When plea in abatement proper—Examples.**

In replevin for the unlawful detention of goods, the fact that the plaintiff owns the property jointly with others is no bar to the action, and can only be objected to by plea in abatement or at the trial in mitigation of damages.⁴ A plea in abatement in a replevin suit that the defendant took the goods as deputy United States marshal, on an execution issued out of United States circuit court, must aver that the execution issued on a valid judgment against defendant in the execution, and that the property levied on was defendant's property. A plea in abatement must always show another forum in which the property has become subject to judicial authority. It must also be certain according to the most rigid rules of precision.⁵ In Kentucky the want of a sufficient bond in replevin may be pleaded in abatement, and if the plaintiff do not give sufficient bond the property will be restored.⁶ The objection that the declaration is in the *detinet* and the writ in the *cepit* and *detinet* must be presented, if at all, by plea in abatement.⁷ It is a good cause for abatement in replevin that, at the time of the taking by the defendant, the chattels were the joint property of the plaintiff and another not a party.⁸ Where a vendee of goods replevied same from the attaching creditors of the vendor, and afterwards

¹ McArthur v. Lane, 15 Me. 245.

² Dickinson v. Noland, 7 Ark. 25; Hartgraves v. Duval, 6 Ark. 506.

³ Fisher v. Busch, 64 Mich. 180 (31 N. W. 39).

⁴ Wright v. Bennett, 3 Barb. (N. Y.) 451.

⁵ Heyman v. Covell, 36 Mich. 157.

⁶ Bloomer v. Craig, 6 Dana (Ky.), 310.

⁷ Brown v. Peevy, 6 Ark. 37.

⁸ McArthur v. Lane, 15 Me. 245; Hart v. Fitzgerald, 2 Mass. 509.

made an assignment for the benefit of creditors, *held*, not to abate the replevin suit, and that the assignee would take the property replevied.¹

§ 815. **A special right of possession is a good defense,** but must usually be pleaded specially, and it must be an actual subsisting right.² It is a good defense that defendant had a special property in the goods in dispute, and by virtue thereof the right of possession.³ A lien for sawing is a good defense to replevin brought for lumber, and the lien is not lost by the removal of the lumber from the place it was sawed and its mixture with other lumber.⁴ An order of a court, placing property in defendant's hands, must be pleaded as any other defense, and is not ground for abating the writ on motion, and the jurisdiction of the court to make the order should be alleged.⁵

§ 816. **A lien in a third person,** which he has not attempted to enforce, is no defense to an action in replevin.⁶ In an action of replevin, to enforce a lien, it is no defense that plaintiff has another remedy provided by the same statute that created his lien. That does not take away his common law right to possession until his lien be satisfied.⁷ To entitle a defendant in replevin to recover against the general owner, he must have an interest in the property itself. An interest in a contract touching the property will not do.⁸

¹ Bedford v. Penney, 65 Mich. 667 (32 N. W. 888).

² Mitchell v. Hinman, 8 Wend. (N. Y.) 667.

³ Lytle v. Crum, 50 Iowa, 37.

⁴ Chadwick v. Broadwell, 27 Mich. 6.

⁵ Fleutge v. Priest, 57 Mo. 515; Id. 53 Mo. 540.

⁶ Burns v. Lidwell, 6 Mo. App. 192.

⁷ Heaps v. Jones, 23 Mo. App. 617.

⁸ Nettleton v. Jackson, 30 Mo. App. 135. In this case defendant took carpets to dust and clean, and, not prosecuting the work promptly, plaintiff replevied the carpets. Defendant did not claim alien but that money was due him for his work. Judgment for defendant was reversed and dismissed, the carpets being in plaintiff's possession, the court citing Dilworth v. McKelvey, 30 Mo. 149; Boutelle v. Warne, 62 Mo. 353.

§ 817. **Title acquired by possession alone may be a good defense**, since it is the settled law of Tennessee that adverse possession of a chattel acquired in good faith, and without fraud, felony, or force, for a period of three years vests the absolute estate with the possession, and divests all right and title out of the original owner. In a replevin action the source of such title cannot be inquired into, and the one who acquires such a title to personal property may maintain replevin and recover the same from the original owner, who has reacquired the possession without his consent, although the property was stolen from the defendant, if the plaintiff was an innocent purchaser from the thief.¹ Replevin brought to recover a horse ten years after it was irregularly sold as an estray is barred by the statute of limitations, the cause of action having arisen at the time of the unlawful conversion of the horse.² The statute of limitations commences to run with defendant's possession of the property.³

§ 818. **A tax warrant is a good defense.** Where defendant justifies under a tax warrant, he does not have to justify the validity of the sale and proceedings under the warrant.⁴

§ 819. **Title acquired from plaintiff is a good defense.** It is a good defense to an action of replevin that plaintiff had sold the property to defendant, even though the plaintiff's title at the time of such sale was qualified and not absolute.⁵

§ 820. **A judgment in trover for the conversion is a good defense and a bar to an action in replevin to recover the same property.**⁶ A judgment in an action of trespass for

¹ Garrett v. Vaughan, 1 Bax. (Tenn.) 113.

² Carr v. Barnett, 21 Ill. App. 137. The statute is five years.

³ Pickins v. Sparks, 44 Ark. 29.

⁴ Enos v. Bemis, 61 Wis. 656 (21 N. W. 812).

⁵ Bragdon v. Penney, 35 Minn. 204 (28 N. W. 241).

⁶ Hatch v. Coddington, 32 Minn. 92 (19 N. W. 393).

the same goods as those replevied, and between the same parties, is a good defense and may be pleaded in bar.¹

§ 821. **A claim of title in defendant is a good defense,** and places the burden on plaintiff to establish affirmatively his title or right to possession. An allegation that the property belongs to defendant and not to plaintiff puts in issue the title of plaintiff, and the burden is on him.² A defendant in replevin may under the general issue show title to the property in himself.³ Under a plea of ownership, and that he did not unlawfully detain the property in controversy, the defendant can prove any fact tending to show his possession was lawful, including the right to prove that the plaintiff based her claim to the possession upon a forged instrument.⁴

§ 822. **That the property is not identical is a good defense,** and such a plea places the burden upon plaintiff to show that the property taken under the writ is the same property claimed by the affidavit and to which plaintiff is entitled. Or if plaintiff's title be founded upon a written instrument and its genuineness is denied, it is a proper defense, and places the burden on plaintiff to establish its genuineness.⁵

§ 823. **Statute of frauds—Who can plead it.** While it is true that a plaintiff in replevin who relies upon a contract of sale must establish one sufficient to pass title, it is also true that the defense of the statute of frauds cannot be used against him except by a party to the contract. The defense of the statute is a personal one, and can only be made by parties or privies.⁶

§ 824. **Fraud as a defense—Must be specially pleaded.** If fraud in plaintiff's title is relied upon as a defense, it

¹ Coffin v. Knott, 2 Green (Iowa), 582.

² Pope v. Jackson, 65 Me. 162.

³ Scudder v. Worster, 11 Cush. (Mass.) 573; Miller v. Sleeper, 4 Cush. (Mass.) 369.

⁴ Gandy v. Pool, 14 Neb. 98 (15 N. W. 223).

⁵ Webber v. Read, 65 Me. 564.

⁶ Dixon v. Duke, 85 Ind. 439; Brown's Statute of Frauds, § 135.

must be specially pleaded.¹ If a defendant rely upon fraud by plaintiff as a defense, it must be specially pleaded in the answer.² Where the defense in a replevin action was a conspiracy between plaintiff and R., the former owner of the property, and one of the badges of the fraud was that plaintiff had boarded with R. at a certain time, *held*, error to refuse to allow plaintiff to show how he came to go to R.'s house to board.³ Where replevin against a sheriff holding under attachments is brought by one who claims by virtue of chattel mortgages and sales thereunder, it is a full defense to show that plaintiff acquired his rights with knowledge of the antecedent rights of the attaching creditors.⁴ It is competent for a sheriff who has levied on a growing crop after the land had been conveyed by the execution debtor, and has afterward taken possession of the harvested crop, to show, in defense to an action of replevin brought against him by the grantee, that the conveyance was fraudulent and void as against the creditor in his execution, and he is not bound first to have the conveyance set aside in a direct proceeding for that purpose.⁵

§ 825. **What are proper defenses—Examples.** A general denial is always a proper defense in replevin, and it is seldom that more is necessary or even proper, and the better pleading is for the defendant to confine himself to that, unless he have a special claim for damage not naturally arising out of the taking, when such claim should be set up. In replevin by an officer to recover property upon which he claims to have made a levy, it is a good defense to show that in fact he made no levy. His return is only *prima facie* evidence of the levy.⁶ It is a good defense to

¹ Gray v. Earl, 13 Iowa, 188.

² Tucker v. Parks, 7 Col. 62 (1 P. 427); Gray v. Earl, 13 Iowa, 188; Dyson v. Ream, 9 Iowa, 51; Copuro v. Builders' Insurance Company, 39 Cal. 123; Lefler v. Field, 52 N. Y. 622; Bliss on Code Pl., § 211, 339.

³ Kay v. Noll, 20 Neb. 380 (30 N. W. 269).

⁴ Barmon v. Clippert, 58 Mich. 377 (25 N. W. 371).

⁵ Pierce v. Hill, 35 Mich. 194.

⁶ Joyner v. Miller, 55 Miss. 208.

an action of replevin that defendant had purchased of one who had purchased of plaintiff on a condition, which condition had not been broken, but had been performed on vendor's part.¹ It is a good defense that the defendant purchased the property for value without notice that it had been obtained by fraud.² An officer who holds the goods of an insolvent, which are claimed by persons to whom the insolvent undertook to sell them, after a demand by those persons, may set up their title in defense to an action of replevin brought by another party to whom the insolvent has also assumed to sell them, and this plaintiff in replevin cannot avail himself of the fact that the goods had not been separated and divided between the first parties claimant.³ If, before suit brought, the defendant unconditionally offer to restore the property, such an offer is a good defense to the action.⁴ Where one is entrusted with personal property, he may, in an action of replevin, contest the right of ownership and possession without a redelivery of possession.⁵ The sufficiency of the defense determined in cases depending upon particular facts.⁶ A general denial puts in issue every material allegation of the petition, and under it the defendant may prove any special matter which amounts to a defense to the plaintiff's cause of action.⁷ One who is in possession of property sold under execution against a third party may contest the validity of the sale in an action by the purchaser for the possession.⁸

¹ *Lambert v. McCloud*, 63 Cal. 162.

² *Lee v. Portwood*, 41 Miss. 109.

³ *Ropes v. Lane*, 9 Allen (Mass.), 502.

⁴ *Savage v. Perkins*, 11 How. Pr. (N. Y.) 17.

⁵ *Gray v. Allen*, 14 Ohio, 58.

⁶ *Parsons v. Hedges*, 15 Iowa, 119; *Buell v. Bell*, 20 Iowa, 282; *Lutz v. Yount*, Phill. (N. C. L.) 367; *Hodgkins v. Dennett*, 55 Me. 559; *Bee-side v. Fischer*, 2 Har. & G. (Md.) 320.

⁷ *Oaks v. Wyatt*, 10 Ohio, 344; *Ferrell v. Humphrey*, 12 Ohio, 113; *Hedman v. Anderson*, 8 Neb. 180; *Creighton v. Newton*, 5 Neb. 100; *Richardson v. Steele*, 9 Neb. 483 (4 N. W. 83).

⁸ *Kennedy v. Clayton*, 29 Ark. 270.

§ 826. **A defense based on a special law must show full compliance with that law.** In replevin for domestic animals it is not a sufficient defense that they were taken up while trespassing, but this must be followed up by proof that the law governing such cases has been complied with since they were so taken up.¹ Where defendant in replevin relies upon a waiver of exemptions by plaintiff to justify the taking, he must plead such waiver.²

§ 827. **Defenses proper in a case of distress.** In an action of replevin for a distress for rent there can be no such thing as an avowry or recognizance while the goods are in the defendant's possession. If he claim as owner, that claim is inconsistent with the allegation that the property was seized as a pledge for rent in arrears, for this is a confession that the goods are owned by a tenant. If, on the other hand, he depend upon his own right to distrain, he can have no standing unless he has surrendered the property in obedience to the command of the writ.³ The question of excessive distress is irrelevant in an action of replevin for the goods distrained.⁴

§ 828. **Defense is waived if not taken advantage of in time.** In an action of replevin, where the court, without objection or exception on the part of defendant, instructs the jury to find for plaintiff for the value of the property, the defendant cannot afterwards be heard to claim that the action cannot be maintained because the property was not in defendant's possession when it was commenced.⁵ If a person not a justice assume to be one and issue a writ in replevin, his action would be void; but if defendant appear and take a change of venue to a legal justice, he waives the error, and the legal justice has jurisdiction.⁶ A United States marshal

¹ James v. Fowler, 90 Ind. 563.

² Murphy v. Sherman, 25 Minn. 196.

³ Cassidy v. Elias, 90 Pa. 434.

⁴ Jimison v. Reifsnider, 97 Pa. 136.

⁵ Porter v. Chandler, 27 Minn. 301 (7 N. W. 149).

⁶ Graves v. Shoefelt, 60 Ill. 462.

in possession by an order of United States court must answer and plead such possession, or it is waived.¹

§ 829. **Improper defenses—Examples.** A party defendant in an action of replevin showing no title cannot impeach that of his opponent for want of consideration.² A defendant who by violence has regained the possession of property which he had sold and delivered cannot defend himself against an action of replevin for the property by proof that he had received nothing.³ In replevin of goods obtained by fraud and paid for by a note on time with worthless securities, the mere fact that he has transferred the note for value before the replevin and never reclaimed it will not defeat the action, unless he had such knowledge as to make his act an affirmation of the sale.⁴ It is no defense to an action of replevin that the officer who sold the property under execution was not an officer. He acted as an officer—that is sufficient. The title to an office cannot be tried in an action of replevin.⁵ It is not for a defendant in replevin to object that the plaintiff acquired title from a third person through an abuse of confidential relations, so long as the person said to be thus defrauded is satisfied and makes no complaint.⁶ A party in possession of goods cannot avoid replevin by wrongfully transferring the possession to another.⁷ Purchase at sheriff's sale is no defense in an action of replevin brought by the rightful owner.⁸ In a replevin suit the defendant will not be allowed to show title in the plaintiff, who has abandoned the suit in order to defeat the claim of an intervenor.⁹ In an action to recover personal property alleged in the

¹ *Baker v. Daily*, 6 Neb. 465.

² *Wyman v. Gould*, 47 Me. 159.

³ *Applewhite v. Allen*, 8 Humph. (Tenn.) 697.

⁴ *Manning v. Albee*, 14 Allen (Mass.), 7.

⁵ *Lufkin v. Preston*, 52 Iowa, 235 (3 N. W. 58).

⁶ *Town v. Tabor*, 34 Mich. 263.

⁷ *Washington v. Love*, 34 Ark. 93; *Nichols v. Michael*, 23 N. Y. 266; *Harkey v. Tellmon*, 40 Ark. 551.

⁸ *Coombs v. Gorden*, 59 Me. 111.

⁹ *Burrows v. Waddell*, 52 Iowa, 195 (3 N. W. 37).

complaint to belong to plaintiff and to be in the possession of defendant, and to be detained by him wrongfully, the answer was a general denial, and specially that the property belonged to plaintiff, but was in possession of defendant's wife as a pledge as security for a debt from plaintiff's to defendant's wife. *Held*, that the special matter was no defense, as it showed a good title and right of possession in plaintiff against everybody except the pledgee, and that the rights between them could not be tried in the present action. As against the plaintiff, defendant showed no right of possession.¹

§ 830. **Destruction by act of God not a good defense.** It was formerly *held* that destruction of the property by act of God was a good defense,² but the later and better doctrine is that if one without right or title seize property by replevin and it die or is destroyed on his hands, it is in his own wrong, and he is liable for its value.³ Plaintiff wrongfully possessed of slaves is, after a judgment for a return, answerable for their value if they die on his hands.⁴ A party not the owner of personal property, who takes it out of the possession of the real owner without his consent, holds it in his own wrong and at his own risk, and if subsequently judgment is rendered against him for the return or its value, he cannot be excused from satisfying the judgment under the plea that the property has been lost even by the act of God.⁵

§ 831. **The death of the property may be shown in mitigation of damages.** When the property replevied dies

¹ *Stowell v. Otis*, 71 N. Y. 36; *Neff v. Thompson*, 8 Barb. 213; *Story on Bailments*, § 352; *Johnson v. Carnley*, 10 N. Y. 570; *Rogers v. Arnold*, 12 Wend. 30.

² *Carpenter v. Stevens*, 12 Wend. 589; *Melvin v. Winslow*, 10 Me. 397;

³ *De Thomas v. Witherby*, 61 Cal. 92; *Brown v. Johnson*, 45 Cal. 76; *Suydam v. Jenkins*, 3 Sandf. 614; *Yates v. Fassett*, 5 Denio, 21; *Rowley v. Gibbs*, 14 Johns. 385; *Maltoon v. Pearce*, 12 Mass. 406; *Carrel v. Early*, 4 Bibb. (Ky.) 270; *Caldwell v. Fenwick*, 2 Dana, 333; *Scott v. Hughes*, 9 B. Mon. 104; *Hinkson v. Morrison*, 47 Iowa, 167; *Drake on Attach.* (6 Ed.) § 341; *Sedgwick on Damages* (Vol. 2), 500.

⁴ *Gentry v. Barnett*, 6 Mon. (Ky.) 113.

⁵ *Blaker v. Sands*, 29 Kan. 551; *De Thomas v. Witherby*, 14 Cal. 262.

or is destroyed while in possession of the plaintiff before the trial and without his fault, if the verdict should be for the defendant, the plaintiff is not liable for the value of the property so lost or destroyed.¹ Where property dies or is destroyed pending the suit, without fault of defendant, he should not answer in damages for the value of the property so lost.²

§ 832. **Taking by a soldier in time of war no defense.** It is no defense to a replevin suit that the defendant took the property from a citizen within the federal lines, as a confederate soldier acting under orders of his superior officer, while on a scout, and was allowed by said officer to keep the horse in lieu of the one he had, which was turned over to the confederate government, and such evidence should have been ruled out.³ The mere act of capturing by a federal scout, and placing under military control the private property of a citizen, did not divest the owner of his title so as to prevent his resisting replevin.⁴

§ 833. **Garnishment is no defense.** It is no defense to an action of replevin by the true owner against an express company for a package, that the express company has been garnished in another action and no order yet made in regard to the property.⁵ The fact that a common carrier has been garnished by a creditor of an insolvent debtor to whom property is consigned is no defense to an action of replevin by the vendor, who has given notice to the carrier and demanded the goods.⁶

¹ *Bobo v. Patton*, 6 Heis. (Tenn.) 172; *Moore v. Crockett*, 10 Hun. 365; *Moseley v. Baker*, 2 Sneed, 367; *Bryan v. Spurgin*, 5 Sneed, 685; *Green v. Smith*, 4 Cold. 440.

² *Bethea v. McLennon*, 1 Ired. L. (N. C.) 523; *Austin's Exrs. v. Jones, Gilmer* (Va.), 341. But a contrary doctrine is expressed in *Carter v. Streater*, 4 Jones L. (N. C.) 62.

³ *Smith v. Groves*, 25 Ark. 458.

⁴ *Taylor v. Jenkins*, 24 Ark. 337.

⁵ *Morin v. Bailey*, 55 Miss. 570. See *Yarborough v. Hooper*, 25 Miss. 112; *Fora v. Dyer*, 26 Miss. 243; *Kellogg v. Freeman*, 50 Miss. 126.

⁶ *C., B. & Q. R. R. v. Painter*, 15 Neb. 394 (19 N. W. 488).

§ 834. **Purchase in market overt or at public sale no defense.** *Markets overt* as established in England have never been recognized in this country, and purchase in market overt as a foundation of title is no defense in replevin by the rightful owner.¹ It is no defense to an action of replevin that the plaintiff sold the property at public auction, nor can it be pleaded in mitigation of damages that defendant in replevin was the purchaser at the sale, further than this may be a guide to fix the value of the property. In some cases of replevin the rule in trover and trespass which allows a return or reacquirement of the goods to be shown in mitigation of damages might be made applicable, but ordinarily not.²

§ 835. **Right of homestead no defense against replevin by the mortgagee.** Where a lessee of land who had the privilege of removing buildings at the end of the term mortgaged a building, and the mortgagee brought replevin, *held*, that the widow of the lessee could not defeat the mortgagee by setting up homestead or the landlord's title.³

§ 836. **A prior foreclosure in chancery is a good defense.** The question of the validity of the mortgage as a lien on the property intended by it in the hands of the plaintiff in replevin, where there has been a foreclosure in chancery, must be determined in the foreclosure suit. In the replevin suit the plaintiff must establish that the property replevied is not that in the mortgage. As to any property embraced in the mortgage, the replevin suit must fail.⁴

¹ Coombs v. Gorden, 59 Me. 111.

² Cary v. Hewitt, 26 Mich. 228.

³ Ballou v. Jones, 37 Ill. 95.

⁴ Austin v. French, 36 Mich. 200.

CHAPTER XXIX.

REPLY.

	Section.		Section.
It is seldom that a reply is necessary	837	A contrary rule has been laid down	841
Reply necessary in case of an avowry—Illustrations . .	838	Claim for damages needs no reply	842
Where the answer is a general denial, no reply necessary	839	Requisites and sufficiency of the replication . . .	843
Property in a third person needs no reply	840		

§ 837. **It is seldom that a reply is necessary** in an action of replevin. The issues are generally made up by an allegation of right of possession by plaintiff and a denial of that right by defendant, and in some states these are all the pleadings allowed by statute. Where the statute does not forbid, and the practice is to file other pleadings, or under the peculiar circumstances of the case it becomes necessary to file a reply, a mere denial of the new matter alleged by defendant is all that is necessary. The cases where a reply in replevin is necessary are those in which the defendant has admitted plaintiff's cause of action, but set up matter in avoidance as a bar to his recovery. As no counter claim or set-off is allowed, the pleadings are limited; otherwise, the pleadings in replevin are governed by the same rules as the pleadings in other cases.

§ 838. **Reply necessary in case of an avowry—Illustrations.** Where the law recognizes a technical avowry, a reply is generally necessary. In replevin for goods distrained, the plaintiff may plead, in bar of the avowry, matter which shows the defendant a trespasser *ab initio*.¹ A plea of tender

¹ Kimball v. Adams, 3 N. H. 182.

to an avowry is good without a proffer of money in court.¹ Where an avowry in replevin alleges a tenancy, a plea which does not show a determination of the tenancy by the expiration of the lease, and how it determined, is not a good plea.² The plaintiff in replevin may plead several pleas to the cognizance of the defendant.³ In replevin both parties are actors, and may set up as many claims of title or possession as they may have, and if defendant avow or justify, the plaintiff may reply or plead double.⁴ Where defendant, in replevin, avows the taking under a vote of the town to raise a sum of money to be expended upon a highway, a replication that the highway was never legally laid out is sufficient.⁵ If the avowry allege that a sum of money was in arrears for rent, and the plaintiff reply that he did not owe it at the time of the distress, it is a sufficient issue.⁶ A replication to an avowry in an action of replevin justifying the taking under a distress for rent in arrears, which avers various breaches of the contract of leasing, whereby the tenant sustained great damage, is fatally defective if it fail to aver that such damages are equal to or exceed the rent due. The naming of several amounts of damages which, when added together, exceed the rent claimed, will not be sufficient, as the party is not bound to prove such claims as laid. The pleading should contain a specific averment that the damages are equal to or greater than the rent in arrear.⁷

§ 839. **Where the answer is a general denial, no reply is necessary,** or where it in effect amounts to that, or where the matter alleged does not constitute a defense in law.⁸ **An**

¹ Judd v. Fox, 9 Cow. (N. Y.) 259.

² Whitney v. Carle, 8 B. Mon. (Ky.) 171.

³ Roberts v. Tennell, 4 Lett. (Ky.) 289.

⁴ Cotter v. Doty, 5 Ohio, 393.

⁵ Stoddard v. Gilman, 22 Vt. 568.

⁶ Inberville v. Self, 4 Call (Va.), 580.

⁷ Lindley v. Miller, 67 Ill. 244.

⁸ Craig v. Davis, 6 Mich. 447; Wilson v. Fuller, 9 Kan. 176; Russell v. Smith, 14 Kan. 366.

answer which, after a general denial, alleges that property belonged to a third party, who transferred it to defendant, and that title and right of possession are in defendant, requires no reply.¹ If a defendant justify under a writ (as an officer), it is a matter of avoidance and not a counter claim, and no reply is necessary, and plaintiff may show in rebuttal that the property was exempt, and so not subject to seizure for debt.² Where the plaintiff in replevin claimed the property by virtue of a chattel mortgage, and the defendant answered that the mortgage was fraudulent, a reply was not necessary to put the allegation of the answer in issue.³ Where an answer in replevin purports to admit a certain fact as stated in the petition, and the petition does not state any such fact, *held*, that the answer will not be construed as alleging affirmatively that such fact exists, so as to require the plaintiff to reply thereto.⁴ Complaint alleged plaintiff's ownership and present right of possession. The answer denies these allegations, avers title to have been formerly in a third person, who sold the property to defendant, whose present title and right to possession is alleged. *Held*, that these allegations of the answer are not new matter requiring a reply, but put in issue the alleged title of plaintiff.⁵

§ 840. **Property in a third person needs no reply**, as it is in effect but a general denial, and raises the general issue. An answer in replevin setting forth that the property in controversy is the property of a third person, and that the defendant as sheriff has levied an attachment on it, and holds it as the property of said third person, is in effect only a general denial, and needs no reply.⁶ In replevin an answer

¹ Williams v. Mathews, 30 Minn. 131 (14 N. W. 577).

² Carlson v. Small, 32 Minn. 492 (21 N. W. 737); Dennis v. Snell, 54 Barb. 416.

³ Williams v. Wilcox, 66 Iowa (23 N. W. 266).

⁴ Hoisington v. Armstrong, 22 Kan. 110.

⁵ Williams v. Mathews, 30 Minn. 131 (14 N. W. 577). See also McArdle v. McArdle, 12 Minn. 53.

⁶ Wilson v. Fuller, 9 Kan. 176.

of property in a stranger or in defendant in effect denies the property or ownership of the plaintiff, and is a good plea in bar, and completes the issue without a reply. A reply to such an answer is not required, and may be stricken out on motion. Sustaining a demurrer to such a reply does not injure the plaintiff.¹ And this is so whether defendant has an absolute property, or a qualified property as bailee of the thing bailed.²

§ 841. **A contrary rule has been laid down.** In replevin, where the defendant pleaded property in a third person, and justified the taking under execution against such third person, and a trial was had without reply to such pleas, *held*, that the defendant was entitled to a verdict of property in such third person, and to a return of the property, the truth of the pleas being admitted by failure to reply denying them.³ Where a defendant in replevin pleads property in a third person, traversing the plaintiff's right, the plaintiff should accept the issue tendered and reaffirm his title concluding to the country.⁴ Where a plea constituting a bar to the action and requiring a replication is left unanswered, it is error to dispose of the case while that plea remains on record without replication.⁵ Where the defendant answered that he did not unlawfully detain, but that the property was in a stranger, a reply was held necessary.⁶

§ 842. **Claim for damages needs no reply.** The claim of defendant for damages for the detention of the property during the pendency of the action is not a counter-claim, and therefore requires no reply.⁷ But if the claim was for special, punitive, or aggravated damages, a reply would be proper.

¹ Landers v. George, 40 Ind. 160; Gentry v. Bargis, 6 Blackf. 261,

² Darter v. Brown, 48 Ind. 395.

³ Simmons v. Jenkins, 76 Ill. 479.

⁴ Prosser v. Woodward, 21 Wend. (N. Y.) 205.

⁵ Ferrell v. Humphrey, 12 Ohio, 112.

⁶ Biddle v. Parke, 12 Ind. 89.

⁷ Ward v. Anderberger, 36 Minn. 300 (30 N. W. 890); Pom. Rem. & Rights, § 767; Sylte v. Nelson, 26 Minn. 105 (1 N. W. 811).

§ 843. **Requisites and sufficiency of the replication** in cases depending upon particular facts.¹ Where the plaintiff claimed as a partnership, and the reply claimed as joint owners, *held*, a departure, and therefore bad.² Where a plaintiff replies a claim of property to a plea justifying a taking of goods under a plaint in replevin, he must designate the time of the claim with precision, so that issue can be taken upon it.³ On a plea in replevin of property in P. & N., a replication that P. and the plaintiff are the same is bad.⁴ In replevin a replication to a plea of property in a stranger, that the defendant entered the house of the plaintiff in the night-time, and took the goods, is no answer to the plea.⁵ When the defendant in an action of replevin pleads property in himself, he voids the injustice of the taking, and the plaintiff in his reply must set forth such facts as will give him dominion and control, even against him who has the legal title.⁶

¹ Powell v. Triplett, 6 B. Mon. (Ky.) 420; Boies v. Witherell, 7 Me. (7 Greenl.) 162; Hopkins v. Hopkins, 10 Johns. (N. Y.) 369; People v. Supervisors, 6 Wend. (N. Y.) 505; Hurlburt v. Goodsill, 30 Vt. 146; Pattison v. Adams, Hill & D. Supp. (N. Y.) 426; Foshay v. Riche, 2 Hill (N. Y.), 247; Carty v. Hudsons, 24 Wend. (N. Y.) 291; Bloomer v. Juhel, 8 Wend. (N. Y.) 448; Nichols v. Dusenburg, 2 N. Y. (2 Comst.) 283; Hopkins v. Hopkins, 10 Johns. (N. Y.) 369; Hunter v. Le Conte, 6 Cow. (N. Y.) 628; Bills v. Vose, 27 N. H. 212.

² Moore v. Stevens, 42 N. H. 404; Nollkamper v. Wyatt (Neb.), 43 Mo. 357.

³ Fisher v. Peirson, 2 Wend. (N. Y.) 345.

⁴ Phillips v. Townsend, 4 Mo. 101.

⁵ Harrison v. McIntosh, 1 Johns. (N. Y.) 380.

⁶ Dixon v. Thatcher, 14 Ark. 141.

CHAPTER XXX.

DAMAGES.

	Section.		Section.
A difficult subject . . .	844	Right of court to assess the damages . . .	859
History and general principles	845	How assessed on dismissal or non-suit	860
May be allowed to both parties	846	Jury cannot give more than is claimed in the pleadings .	861
Damages not the subject of an independent action .	847	Limit of defendant's recovery	862
Must be confined to matters arising out of the wrongful taking or detention . .	848	Plaintiff's damage where he has had possession . . .	863
So only matters arising out of the replevin suit can be urged in mitigation of damages	849	Measure of plaintiff's damages where he is not able to give bond	864
Value of property and damages should be found separately	850	Defendant's damages where plaintiff has had possession	865
Defendant not entitled to damage unless he claim a return	851	That defendant reacquired the possession before the determination of the suit may be shown in mitigation	866
Rule where property has been returned to defendant and plaintiff prevails . . .	852	Death or destruction of the property does not lessen the liability	867
General rule of damages—Where plaintiff prevails .	853	The same	868
Measure of damages affected by the interest of plaintiff .	854	Death of slaves—Pending suit—No defense to judgment for value	869
If the plaintiff prevail in the action, but the property has not been delivered to him .	855	The rule the same in case defendant keeps the property and gives a delivery bond .	870
General rule of damages where defendant prevails . . .	856	Emancipation of the slaves in dispute no defense . . .	871
If the defendant succeed in the action	857	Where property is hopelessly lost or destroyed . . .	872
Rule where the successful party has the right to elect	858	That plaintiff had delivered the property to a receiver of defendant does not lessen his liability	873

Section.	Section.
That a party has transferred his title may be shown in mitigation of damages 874	Damages for use need not be specially claimed 892
Possession of the property during the pendency of the suit may be shown in mitigation 875	Damages for use cannot be recovered in a separate action 893
Where successful party has become repossessed, his damages are what it cost him to get possession . . . 876	Plaintiff cannot have damages for the use and for value too 894
Interest as a proper measure of damages 877	One who has no right to use the property as a pledgee or an officer cannot recover for the use 885
Interest not allowed where the value is fixed at a time subsequent to the taking . 878	If one without any right replevy the property, the rule is different 896
The ordinary damage is the value at the time of taking, with interest on that value 879	The party claiming the use must show that he was in position to use it 897
Where property is not taken, the rule is ordinarily the value with interest . . . 880	Interest may be allowed on the usable value 898
The rule the same as in trover 881	Measure of damages between vendor and vendee . . . 899
Interest is not in the nature of special damages . . . 882	Measure of damages in suit for promissory note or other evidence of debt . . 900
If property returned interest, no part of the damage . . 883	In case of stocks is the value on day of trial 901
Interest on the value has been held to be discretionary with the jury 884	Where it has been decreased in value by the act of the defeated party, he is responsible for the loss . . . 902
Interest and profits both can not be allowed as damages 885	In the case of keepsakes, souvenirs, etc. 903
Interest not always a proper measure of damages . . . 886	Damages to compel a return 904
Interest not the measure of damages where property has a usable value 887	Measure of damages as between joint owners . . . 905
The same 888	The damages for property severed from real estate . 906
Excessive damages must not be allowed for use 889	Measure where property has been severed and increased in value by defendant acting in good faith 907
The purpose for which property is used should be considered in estimating the value of use 890	A willful trespasser not entitled to anything for his labor 908
The usable value a proper element of damages 891	General rule of damages where property has been changed in form 909

Section.	Section.
If the original owner recover the value of his property at the time it was taken . . . 910	Where property was injured in the hands of a wrongful taker, the expenses of doctoring and care are properly allowable as damages . . . 917
Pleadings may be amended to show change in value pending the litigation . . . 911	Deterioration in value in hands of defendant—Expenses incurred in searching for property by plaintiff . . . 918
Where the value of the property has been increased by a willful wrongdoer . . . 912	Loss from interruption of business and machinery lying idle 919
Where the defeated party acted in good faith, he is entitled to the increase of value from his labor 913	Expenses, counsel fees, etc. . . 920
Depreciation in value is a proper element of damage . 914	The same—Illustrations . . 921
Under a wrongful taking the defendant is liable for the depreciation 915	Money paid a security company to furnish bonds can not be allowed as damages 922
Where the holder neglects the property, he is responsible for the loss in value . . . 916	Expenses of taking and removing property 923

§ 844. **A difficult subject.** The subject of damages is one of the most difficult in replevin, and one on which the courts are most at variance. And great difficulty is met with in attempting to harmonize the numerous decisions, for the reason that the circumstances under which the controversy arose and the law under which it was carried on differ widely. Where both parties act in good faith on an honest belief of right, the difficulty is not so great. Where malice is in no way an element in a litigation over the right to personal property, the rule of damages is the same, whether the action is of contract or of tort. The real question is by what rule shall we with most certainty arrive at a knowledge of what the damages actually are.¹ But when, as is too frequently the case, one of the parties acts maliciously, much more difficulty is experienced in formulating a just rule. The only general rule in such cases is to leave much to the discretion of an intelligent jury. In the following sections I have classified

¹ *Talcott v. Crippen*, 52 Mich. 633 (18 N. W. 392).

the decisions as well as their nature would permit, and at the close of the subject have given a few postulates, which it is hoped will be of advantage in deciding questions that may arise under this branch of our subject. The majority of the best considered decisions limit the damages to compensation. But what is proper compensation? Is it interest, or the profits made by the use of the property in question, or the profits which the owner would probably have made if he had had the property itself? The profits which the owner might have made can only be guessed at, and this is a sufficient reason for rejecting these profits as a measure of compensation. On the other hand, to limit the compensation to interest, at the legal rate, would frequently enable the wrongdoer to profit by his own wrong, and be an inadequate compensation to the owner. It may, therefore, be necessary to give him the profits made by the use of his property in question. To do so may moreover be justified upon the ground that the profits are accretions to the property which has yielded them, and ought to belong to the owner of such property, in accordance with the *accessorium sequitur suum principale*. At the same time it may not be always right to restrict the owner's compensation to the profits made by the use of his property, for it may happen that it has made no profits or less profit than legal interest.

§ 845. **History and general principles—Damages in replevin are now generally awarded to the successful party.**¹ It has been held that they could not be recovered unless asked for in the pleadings.² But this is not the general rule.³ If either the right of property or right of possession are found in plaintiff, he is entitled to damages.⁴ But under the

¹ Kindall v. Fitts, 2 Foster (N. H.), 9; Brown v. Smith, N. H. 38; Booth v. Ableman, 20 Wis. 24; Graves v. Sittig, 5 Wis. 219; Wright v. Williams, 2 Wend. 636.

² Faget v. Brayton, 2 Har. & J. (Md.) 350; Croise v. Bilson, 6 Mod. 102.

³ McKean v. Cutter, 48 N. H. 372.

⁴ Williams v. West, 2 Ohio St. 86.

common law they were not allowed in favor of the defendant, for the reason that the action would only lie in case of a distress, and the lord had no right to use the property (cattle) distrained, and was not damaged if defeated. But the plaintiff having lain out of the use of his beasts, was allowed damage when successful.¹ To prevent vexatious suits or "false clamour," the plaintiff was required to give pledges that he would prosecute the suit, and if he failed to sustain his claim he was amerced. This practice was followed by awarding costs to the successful party, and this practice grew into the allowance of damages to the successful party in cases in which costs were not sufficient.² And as replevin was extended to other causes of action than distress, the reason for refusing damages to defendant did not exist, and the practice of allowing damages to the successful party followed as a natural consequence, and has long been the settled rule.

§ 846. **May be allowed to both parties.** Where the property consists of several articles, it sometimes happens that one party has the better right to part of the property, and the other party to another part, and the judgment in such cases should be that the plaintiff retain part, and the other property be returned to defendant, and the costs should be apportioned according to the relative values of the two parts of the property, and damages should be allowed in the same way.³ Costs are almost entirely within the discretion of the court in such cases, and damages are largely in the discretion of the jury. It has been *held* that the court had the power to offset the one against the other, and only give

¹ Winnard v. Foster, Lutw. 374; Anon Dyer, 280; Briggs v. Gleason, 29 Vt. 80; Lamb v. Day, 8 Vt. 407; Hopewell v. Price, 2 Har. & G. (Md.) 275.

² Savile v. Roberts, 1 Ld. Ray. 380.

³ Brown v. Smith, 1 N. H. 36; Williams v. Beede, 15 N. H. 483; Clark v. Keith, 9 Ohio, 73; Seymour v. Billings, 12 Wend. 286; Wright v. Mathews, 2 Blackf. (Ind.) 187; Powell v. Hinsdale, 5 Mass. 343. So where there are several plaintiffs, judgment may be in favor of one and against the others. Hamilton v. Browning, 94 Ind. 242.

judgment for the balance.¹ In this, replevin differs from other actions. If the plaintiff succeed, he not only is entitled to the property, but he is also entitled to any damages for the unlawful interference with his possession by defendant. If, on the other hand, the defendant recover, he is entitled to a return of the property which was wrongfully taken from him, and damages for the unlawful interference with his possession. While the claim for damages is secondary to the claim for the property, it is just as much a part of the suit,² and the plaintiff cannot escape a judgment for damages by dismissing his suit.³ The defendant is regarded as suing for the return of the goods and for damages.⁴

§ 847. **Damages not the subject of an independent action, must be assessed in the replevin suit.** Damages for the detention must be assessed in the replevin suit, and cannot be made the basis of an independent suit.⁵ They are but an incident to the proceeding for the property, and such questions should be settled when the main issue is settled, thus saving a multiplicity of suits.⁶ This matter is regulated by statute, and in some states damages may be recovered on the bond if not fixed in the replevin suit.⁷ The

¹ *McLarren v. Thompson*, 40 Me. 285; *Poor v. Woodburn*, 25 Vt. 239; *Wright v. Williams*, 2 Wend. 633; *Porter v. Willet*, 14 Abb. Pr. 319; *Butcher v. Green*, Doug. (Eng.) 652; *Vollum v. Simpson*, 2 Bos. & Pul. 368.

² *Buckley v. Buckley*, 12 Nev. 430; *Messer v. Bailey*, 11 Foster (N. H.), 9; *Bell v. Bartlett*, 7 N. H. 178; *Groves v. Sittig*, 5 Wis. 223; *Parham v. Riley*, 4 Cold. (Tenn.) 10; *Dorsey v. Gassaway*, 2 Har. & J. (Md.) 402; *Bell v. Bartlett*, 7 N. H. 178.

³ *Fallon v. Manning*, 35 Mo. 274; *Collins v. Hough*, 26 Mo. 149.

⁴ *Gould v. Scannel*, 13 Cal. 430; *Bonner v. Coleman*, 3 B. Mon. (Ky.) 464; *Smith v. Snyder*, 15 Wend. 324; *Berghoff v. Hickwolf*, 26 Mo. 512; *Smith v. Winston*, 10 Mo. 299.

⁵ *White v. VanHouten*, 51 Mo. 577; *Hohenthal v. Watson*, 28 Mo. 360.

⁶ *Hohenthal v. Watson*, 28 Mo. 360; *Redmon v. Hendricks*, 1 Sandf. (N. Y.) 32; *Glann v. Younglove*, 27 Barb. 480; *Bower v. Tallman*, 5 W. & S. (Pa.) 556.

⁷ *Hall v. Smith*, 10 Iowa, 45; *Washington Ice Co. v. Webster*, 62 Me. 363; *Whitney v. Lehmar*, 26 Ind. 506.

better course is to have the damages assessed in the replevin suit,¹ as this would bind the principal in the bond, at least. In Illinois it is held not to bind the sureties.² By the common law, upon an omission to have damages assessed in the replevin suit, the defendant was entitled to have a writ of inquiry to assess them, and this is the practice in some states now.³

§ 848. **Must be confined to matters arising out of the wrongful taking or detention.** In an action of replevin no damages are recoverable except such as result from the disturbance of the possession, and the plaintiffs are not entitled to recover for breach of contract in the trade out of which the action grew.⁴

§ 849. **Only matter pertaining to the replevin suit can be urged in mitigation of damages.** As we have seen (§ 791) there is no set-off or counter claim in replevin; so it is not competent to urge in mitigation of the damages things properly triable in another suit. A debtor who made an assignment afterward resumed control of the goods, and the assignee brought replevin for them. *Held*, that losses by the assignee's negligence could not be charged on him in this or in any suit at law. An accounting in respect to a trust can only be settled in a court of equity.⁵

§ 850. **Value of property and damages should be found separately.** In replevin there is a distinction between the value of the property to be found and the amount of the damages to be assessed, and they must be found separately. The value of the property at the time of the assessment is the value to be found by the jury, and any depreciation occasioned by the taking and detention should be considered in estimating the damages.⁶ In no case should they be

¹ *Pettygrove v. Hoyt*, 11 Me. 66; *Sopris v. Lilly*, 2 Col. 498.

² *Shepard v. Butterfield*, 41 Ill. 78.

³ *Humfrey v. Misdale*, Comb. 11; *Herbert v. Waters*, 1 Salk. 205.

⁴ *Herzberg v. Sachse*, 60 Md. 426.

⁵ *Rodman v. Nathan*, 45 Mich. 607 (8 N. W. 562.)

⁶ *Mix v. Kepner*, 81 Mo. 93; 2 Sedg. on Dam. 428; 1 Sedg. on Dam. 173 to 185, *top pp.*

amalgamated.¹ They may be assessed in one sum by agreement;² but this practice is not to be commended, as the claims for value and for damages are given on different theories of law. Value is only allowed where the property is not restored. Damages are to compensate for the deprivation of possession, and injury caused by the wrongful taking.

§ 851. **Defendant not entitled to damages unless he claim a return.** The plea for a return is in the nature of a cross petition, and unless a party ask for a return, as a general rule he is not entitled to damages for the detention, even if successful.³ This rule grows out of the old rule adopted in replevin in the *cepit and detinet*, where the pleas of *non cepit* and *non detinet* admitted plaintiff's right to the property, but denied the wrongful taking or detaining. Of course, on such a plea alone, the defendant, if successful, was not entitled to damages.⁴ But in some states it has been provided by statute that, under such pleas, a return could be had, and of course, if a return can be awarded, damages can be given.⁵ If the defendant never had possession, he cannot have return, nor is he entitled to damage for the detention of goods he never had.⁶ Where plaintiff got possession under the statute, and defendant does not claim a return, if successful, defendant is entitled to judgment for the value of the property or of his special interest therein.⁷ The value of the property is only an element of damages when it is awarded to the party who does not have it in pos-

¹ *Sayers v. Holmes*, 2 Coldw. (Tenn.) 259.

² *McCabe v. Morehead*, 1 W. & S. (Pa.) 515.

³ *Gould v. Scannell*, 13 Cal. 430; *Smith v. Snyder*, 15 Wend. 324; *Bonner v. Coleman*, 3 B. Mon. (Ky.) 464.

⁴ *Hopkins v. Barney*, 2 Fla. 44; *Bates v. Buchanan*, 2 Bush. (Ky.) 117; *Bemus v. Beekman*, 3 Wend. 668; *Whitwell v. Wells*, 24 Pick. 25; *Douglass v. Garrett*, 5 Wis. 85.

⁵ *Pickens v. Oliver*, 29 Ala. 528.

⁶ *Richardson v. Reed*, 4 Gray (Mass.), 443.

⁷ *Klötty v. Delles*, 45 Wis. 484; *F. L. & T. Co. v. Com. Bank*, 15 Wis. 424; *Timp v. Dockham*, 32 Wis. 146.

session at the time of trial. Where, under the circumstances of the case, the result is a transfer of the actual possession, the value should be found, and the judgment is for the value in case return is not made, as well as the damages.¹

§ 852. **Rule where property has been returned to defendant and plaintiff prevails.** In replevin, where the property has been seized by the sheriff and then returned to the defendant under the statute, plaintiff, on proof of the unlawful taking and detention of the property described in the complaint and of its value, may take judgment for such value with damages for the detention, without showing the identity of the property seized by the sheriff with that taken by the defendant. In such cases the action is regarded as a concurrent remedy with trover, and to be governed by the same rules.² Where property was claimed by defendant and left in his hands on his filing statutory bond, verdict for the plaintiff should be for the value of the goods, as well as the damages caused by the taking.³ In such case the jury should find the value of the property, as well as the amount of the damage for the detention, so that the plaintiff may have judgment for the value in case the property is not returned to him, but the judgment should be in the alternative.⁴

§ 853. **General rule of damages—Where plaintiff prevails.** If the property has been delivered to him on the writ, he is entitled to a judgment affirming his right of possession, and, if title was involved, the right of property and nominal damages and costs, and if he has pleaded and proved it, damages for such sum as will compensate him for the injury he has sustained by reason of the wrongful taking and detention of the defendant, and any depreciation in value it

¹ *Merrill v. Butler*, 18 Mich. 294; *Laborde v. Rumpa*, 1 McCord, 15; *Bates v. Buchanan*, 5 Bush. (Ky.) 117.

² *Brewster v. Carmichael*, 39 Wis. 456; *Bigelow v. Doolittle*, 36 Wis. 115.

³ *Frazier v. Fredericks*, 24 N. J. L. (4 Zab.) 162.

⁴ *Frazier v. Fredericks*, 24 N. J. L. (4 Zab.) 162; *Field v. Post*, 9 Vroom (N. J.), 346; *Pugh v. Calloway*, 10 Ohio St. 488.

may have sustained while so wrongfully detained.¹ If the property has been delivered to the successful plaintiff, he is still entitled to damages for the detention, and the usual measure of damages in such a case would be the value of its use during the detention.²

§ 854. **Measure of damages affected by the interest of plaintiff.** The measure of damages in this action may be affected by the interest of the plaintiff. The general theory is that a party should recover his actual damages, and if his interest is only a lien as by virtue of an attachment, execution, or mortgage to secure a debt, his right to recover may properly be limited as against the owner to the amount of his claim.³ And if he has only a limited interest of any kind, such as a right to the temporary possession, his damages should ordinarily be limited to the damages sustained by the interference with that interest.⁴

§ 855. **If the plaintiff prevail in the action, but the property has not been delivered to him,** it is usually prescribed by statutes that he have an alternative judgment, that the property be returned to him, or if a return cannot be had, that he recover its value with interest and the loss sustained by the plaintiff by its detention, which is determined on the trial and fixed by the judgment.⁵ If the prop-

¹ *Young v. Willett*, 8 Bosw. (N. Y.) 486; *Moore v. Shenk*, 3 Barr. (Pa.) 13; *Stevens v. Tuite*, 104 Mass. 333; *Fisher v. Whoollery*, 25 Pa. St. 198; *Nicholas Ins. Co. v. Alexander*, 10 Humph. (Tenn.) 383.

² *Allen v. Fox*, 51 N. Y. 562; *Butler v. Mehring*, 15 Ill. 483; *Clapp v. Walter*, 2 Texas, 130; *McGavock v. Chamberlain*, 20 Ill. 219; *McGinnis v. Hart*, 6 Iowa, 204; *Wallis v. Johnson*, 16 Ind. 374; *Morgan v. Reynolds*, 1 Mont. 163.

³ *Hayden v. Anderson*, 17 Iowa, 158; *Warner v. Matthews*, 18 Ill. 83; *Allen v. Judson*, 71 N. Y. 77; *Rhodes v. Woods*, 41 Barb. 471; *Fitzhugh v. Wiman*, 9 N. Y. 559; *Seaman v. Luce*, 23 Barb. (N. Y.) 240; *Jennings v. Johnson*, 17 Ohio, 154; *Noble v. Epperly*, 6 Ind. 468; *Eggleston on Dam.* 299. See *Deal v. Osborn*, (Minn.) 43 N. W. 835.

⁴ *Waverly v. Darby*, 42 Barb. 411; *Hawley v. Warner*, 12 Iowa, 42; *Iron Co. v. Tilghman*, 13 Md. 74; *Field on Dam.* 665; *Sedg. on Dam.* II., 430; *Southerland on Dam.* 572.

⁵ *Brewster v. Silliman*, 38 N. Y. 423; *Cochran v. Golwold*, 41 N. Y.

erty was not delivered to him on his writ, then its value at the time of the unlawful taking, with interest, and any special damage pleaded and proved, is the measure of his recovery.¹ The property not being in court, no order can be made in regard to it.

§ 856. **General rule of damages where defendant prevails.** If the property has been taken from him under the writ, he is entitled to have it restored to him, or its value at the time it was taken from him, with interest on that value, with at least nominal damages and costs, and any special damages he may plead and prove measured by the same rule that plaintiff's damages are measured by where he prevails. If a return is adjudged, and the property has decreased in value, the depreciation should be allowed as damages. If it has increased in value, he is allowed the increase on the principle that it was his property all the time.² If plaintiff has added to the value of the property by his labor, a different question arises. See § 907 *et seq.*

§ 857. **If the defendant succeed in the action,** he is entitled to a judgment for a return of the property, or, in default thereof, he is entitled to a judgment at least for its value and damages for the taking and detention, where it has been taken on the writ and delivered to the plaintiff; and if the property wrongfully taken from the defendant by virtue of

Sup. Ct. 317; *Daws v. Rush*, 28 Barb. 157; *N. Y., &c., Co. v. Flynn*, 55 N. Y. 653; *Bales v. Scott*, 26 Ind. 202; *Kehoe v. Rounds*, 69 Ill. 351; *Berthold v. Fox*, 21 Minn. 51; *Rawark v. Lee*, 14 Ark. 425; *Jetton v. Smead*, 29 Ark. 372; *Anderson v. Tyson*, 14 Miss. 244; *Moore v. Shenk*, 3 Pa. St. 13; *Clark v. Martin*, 120 Mass. 543; *Booth v. Ableman*, 20 Wis. 602; *Eggleston on Dam.*, 297, 303; *Field on Dam.* 663; *Sedg. on Dam.* II., 436, 440; *Southerland on Dam.* III., 538; *Witcher v. Watkins*, 11 Col. 548 (19 P. 540).

¹ *Ewing v. Blount*, 20 Ala. 694; *Barkesdale v. Appleberry*, 23 Mo. 389; *Hohenthal v. Watson*, 28 Mo. 360; *Suydam v. Jenkins*, 3 Sandf. 615; *Russell v. Smith*, 14 Kan. 374; *Fisher v. Whoollery*, 25 Pa. St. 197; *Williams v. Archer*, 5 M. G. & S. (57 E. C. L.) 324.

² *Mayberry v. Cliffe*, 7 Cold. (Tenn.) 125; *Allen v. Judson*, 71 N. Y. 76; *Pierce v. Van Dyke*, 6 Hill (N. Y.), 613; *Neis v. Gillen*, 27 Ark. 187; *Hooker v. Hammill*, 7 Neb. 231.

a writ of replevin is adjudged to be returned, and is returned to the defendant, he may not only recover the value of the use of such property during the detention, but also for any injury to or deterioration of the same, or any decrease of its value, whether this is owing to the fault of the plaintiff in the replevin suit or not.¹

§ 858. **Rule where the successful party has the right to elect to take the property or a judgment for the value.**

In Wisconsin, after verdict, a plaintiff may elect to take a judgment for the value so found instead of the alternative judgment for the return or the value.² In an action of replevin where the property is delivered to the plaintiff on the writ, and defendant elects, on the trial, to take a judgment for its value under the statute, the measure of his damage is such value at the time of the unlawful taking, with interest thereon to the date of the verdict.³ In such case evidence of the *value* of the *use* of such property is admissible on the trial •• in the absence of a waiver of its return, and a failure to object to such testimony is not a waiver of the error of the court in allowing the jury to add *such* value to the value of the property, where its return is waived at the close of the trial.⁴ Where plaintiff failed to prove his title to the goods, and defendant elected to take their value, instead of receiving the goods, the measure of damages was *held* to be the value of the goods when they were replevied, with interest, as there was no evidence of special damage, and not the value at the time of the defendant's action.⁵ In some states it is at the

¹ *Gordon v. Jenny*, 16 Mass. 465; *Suydam v. Jenkins*, 3 Sandf. (N. Y.) 614; *Sedgwick on Damages*, 499; *Field on Damages*, § 832; *Eggleston on Damages*, 297-303; *Sedg. on Dam.*, II., 428, 435; *Southerland on Damages*, 559-561.

² *Pratt v. Donovan*, 10 Wis. 378.

³ *Just v. Porter*, 64 Mich. 565 (31 N. W. 444). This case refers to and overrules *Cook v. Hamilton*, 67 Iowa, 394 (25 N. W. 676), where it is held the proper measure of damages is the value at the time of trial. *Houselman v. Kegel*, 60 Mich. 541.

⁴ *Just v. Porter*, 64 Mich. 565 (31 N. W. 444).

⁵ *Suydam v. Jenkins*, 3 Sandf. (N. Y.) 614.

option of defendant in replevin to return the goods, where he has kept them in his possession, or pay the value as assessed by the jury.¹ But the contrary is the general rule.² The better rule is that the goods shall in all cases be returned where capable of return.

§ 859. **Right of court to assess the damages.** Replevin and the assessment of damages therein are peculiarly matters for the jury, but a jury may be waived and the matters in controversy left to the court by consent of parties.³ In an action of replevin before a justice of the peace, where a trial by jury is not demanded, the justice has power to hear and determine the action and make such findings and assessment of damages as might have been made by a jury had one been demanded.

§ 860. **How assessed on dismissal or non-suit.** The weight of the decisions is that in replevin on a default or dismissal by plaintiff, or an abandonment of the action by him in any way, the court has the right to hear evidence and assess defendant's damages without the aid of a jury, and such act is not an invasion of the constitutional right of trial by jury.⁴ Where a defendant recovers judgment by non-suit for the value of the property taken, he may have the value assessed by the court without a jury, on giving proper notice,⁵ or it may be assessed by a jury without notice,⁶ or upon a writ of inquiry,⁷ but the value and damages should be assessed separately.⁸

¹ *Allen v. Fox*, 51 N. Y. 569.

² *Mayberry v. Cliffe*, 7 Cold. (Tenn.) 121.

³ *Baker v. Dailey*, 6 Neb. 465; *Frey v. Drahos*, 7 Neb. 194; *Leighton v. Stewart*, 10 Neb. 224 (4 N. W. 1051).

⁴ *Laney v. Remuson*, 2 N. M. 245. See *Brown v. Horning*, (Mich.) 43 N. W. 453.

⁵ *Pearson v. Eaton*, 18 Mich. 79.

⁶ *Van Alstine v. Kittle*, 18 Wend. (N. Y.) 524. See *Rodman v. Hendricks*, 1 Sandf. (N. Y.) 32.

⁷ *Murphy v. Jenkins*, 1 Denio (N. Y.), 669.

⁸ *Nashville, etc., v. Alexander*, 10 Humph. (Tenn.) 378. Compare *Pickett v. Bridges*, 10 Humph. (Tenn.) 171; *Sayers v. Holmes*, 2 Coldw. (Tenn.) 259.

§ 861. **Jury cannot give more than is claimed in the pleadings.** In assessing damages or value in a replevin action the jury cannot find more than claimed by the pleadings and included in the issues joined.¹ In replevin before a justice it is error to assess the value of the property as against the defendant at a greater amount than that sworn to by plaintiff in his affidavit.² But in district court it may be assessed at a greater amount than in the affidavit, but not greater than the amount alleged in the petition.³ If the plaintiff count in the *detinuit*, he can recover damages for the detention up to the taking only, though he should prove the property to be still in the defendant's possession.⁴ A better rule was followed in Arkansas lately, where it was held that all damage sustained by the detention up to the date of verdict should be included therein.⁵

§ 862. **Limit of defendant's recovery.** Where the property is taken from defendant and delivered to plaintiff, and on trial is awarded to defendant, he is not entitled to damages for the taking and withholding unless he claimed such damages in his answer.⁶ In an action for a return the sheriff cannot take more damages than he claims in his answer.⁷ In no event is the defendant entitled to a judgment against the plaintiff for more than the value of the property replevied, together with damages for the detention thereof.⁸ The judgment for defendant on a plea of property in replevin is *pro*

¹ Tiedman v. O'Brien, 36 N. Y. Sup. Ct. 539. No motion appears to have been made to amend the pleadings to conform to the verdict in this case. Hoskins v. Robins, 3 Saund. 320, n. 1; Huggefurd v. Ford, 11 Pick. 223; O'Neal v. Wade, 3 Ind. 410. In replevin for goods distrained for rent, a less sum may be recovered than the avowry alleges to be due. Barr v. Hughes, 44 Pa. St. 516.

² Jaquith v. Davidson, 21 Kan. 341.

³ Crawford v. Furlong, 21 Kan. 698.

⁴ Truitt v. Revell, 4 Harr. (Del.) 71.

⁵ Lesser v. Norman, (Ark.) 11 S. W. 281.

⁶ Whitcomb v. Hoffman, 14 Hun. (N. Y.) 335.

⁷ Eaton v. Caldwell, 3 Minn. 134.

⁸ Severence v. Melick, 15 Neb. 610 (19 N. W. 596.)

retorno habendo; but if he cannot have a return, he may have judgment for damages to the value of the goods, etc.¹

§ 863. **Plaintiff's damages, where he has had possession of the property** while suit was pending, are limited to the damages for the taking and detention up to the time of the replevin.² Where the goods are delivered to the plaintiff under the writ, he is entitled to recover damages for the taking merely. Where the property is retained by defendant pending the suit, the plaintiff, on a finding in his favor, is entitled to have the value of the property assessed also.³ In replevin the plaintiff is entitled to damages for the unlawful taking, as well as the unlawful detention.⁴ Personal property was delivered to plaintiff in replevin under his bond. Subsequently he sold it. *Held*, that he was not thereby barred from maintaining his suit and recovering damages for the illegal detention of his property.⁵ Where the jury find for the plaintiff, they must assess his damages for the seizure and detention, and judgment will be rendered therefor and costs.⁶ Where the property has been delivered to the plaintiff, and he recovers a verdict for it, its value need not be assessed by the court or jury.⁷ Though the sheriff delivered the property to the plaintiff on the writ, yet he may also have damages for injury by reason of the illegal detention.⁸

§ 864. **Measure of plaintiff's damages where he is not able to give bond** is the value of the property. Where plaintiff brought suit in replevin for property and damages

¹ Clark v. Adair, 3 Har. (Del.) 113; Dwight v. Enos, 9 N. Y. (5 Seld.) 470.

² Fisher v. Whoolery, 25 Pa. St. 197.

³ Lendauer v. Teeter, 41 N. J. 255; Kendall v. Fitts, 22 N. H. (2 Fost.) 1; Messer v. Bailey, 31 N. H. (11 Fost.) 9; Warner v. Aughenbaugh, 15 Serg. & R. (Pa.) 9.

⁴ Gray v. Nations, 1 Ark. 557.

⁵ Donohoe v. McAleer, 37 Mo. 312.

⁶ Parham v. Riley, 4 Coldw. (Tenn.) 5.

⁷ Merrill v. Butler, 18 Mich. 294.

⁸ Tracy v. New York, 9 Bosw. 396; Hoover v. Rhoads, 6 Iowa, 505.

for the detention, but was unable to give the required bond, and the property was returned to the defendant, but on the trial plaintiff was successful, he was allowed the value as damages without amending his petition.¹ Where the property was not delivered to plaintiff in replevin, and, on a verdict in his favor, he elected to take the money judgment for the value instead of judgment for the possession, he does not thereby waive his right to damages for the wrongful detention.²

§ 865. **Defendant's damages where plaintiff has had possession.** Where plaintiff has obtained possession of the property under the statute, if the jury find defendant entitled to the possession, he may waive a return of it, and take judgment for its value alone.³ In New Hampshire a judgment for the defendant in replevin must be for the value of the chattels replevied in damages, and not for a return of them.⁴ In Mississippi, where a writ of inquiry is awarded in the action, the jury must assess the value of the property replevied, as well as the damages sustained by the defendant.⁵ If defendant is successful, judgment should be for a return of the property or its value and damages.⁶

§ 866. **That defendant reacquired the possession before the determination of the suit may be shown in mitigation of his damages.** A defendant in an action of replevin recovers the value of the property, after his right to the possession and ownership is established, for the reason that by the proceeding he is deprived of his property. The deprivation of his

¹ Pugh v. Calloway, 10 Ohio St. 488.

² Cook v. Hamilton, 67 Iowa, 394 (25 N. W. 676). Sec. 3241 of the Iowa code provides, if the party found to be entitled to the property be not already in possession thereof, by delivery under this chapter, he may, at his option, have execution for the specific delivery of the property or judgment for the value thereof, as found by the jury.

³ Farmers, etc., v. Commercial, etc., 15 Wis. 424.

⁴ Bell v. Bartlett, 7 N. H. 178.

⁵ Pearce v. Twichell, 41 Miss. 344.

⁶ Kendall v. Fitts, 22 N. H. (2 Fost.) 1; Messer v. Bailey, 31 N. H. (11 Fost.) 9; Warner v. Aughenbaugh, 15 Serg. & R. (Pa.) 9.

property is the ground upon which he recovers its value. If this deprivation be but temporary, and the property is returned to his possession before his rights thereto are determined in the action, this fact may be shown to defeat his claim for its value. In such a case, while he may be entitled to recover for the detention and damages resulting therefrom, he will not be allowed its value.¹

§ 867. **Death or destruction of the property does not lessen the liability**, as a rule, as the action may proceed as one for damages. The law will not permit a wrongdoer to come in and set up that the property died or has been destroyed in his hands, and therefore he ought not to be called on to respond in damages, though of course the judgment for a return cannot be enforced. When the defendant took or retained the property illegally, he assumed all the probable consequences of his act, and cannot now be heard to complain. To permit a defendant who wrongfully takes possession to claim, when a loss has occurred, that he held the property at the risk of the real owner and not his own, would be very unjust. His inability to deliver in such cases is no defense.² It should be borne in mind that the object of replevin is two-fold—first, to have the return of the article; if that is impossible, then, second, to secure adequate damages for the failure to return. If the second object is to be prevented by the death or destruction of the property, the writ would be shorn of much of its power and value as a remedy. But such is not the rule of law.³ There are a few apparent exceptions to this rule, but they are where the courts regarded the party as rightfully in possession, and *held* that he was only liable for ordinary care.⁴

¹ Harrison v. Ryan, 31 Iowa, 156; Dewitt v. Morris, 13 Wend. 496.

² Caldwell v. Fenwick, 2 Dana, 333; Scott v. Hughes, 9 B. Mon. 104; Austin's Exrs. v. Jones, 1 Gilmer (1 Va.), 341; Gibbs v. Bartlett, 2 W. & S. (Pa.) 34; Haile v. Hill, 13 Mo. 612.

³ Carrel v. Early, 4 Bibb. (Ky.) 270; Middleton v. Bryan, 3 Maul & S. 158. See Suydam v. Jenkins, 3 Sandf. 644.

⁴ Carpenter v. Stevens, 12 Wend. 589; Melvin v. Winslow, 1 Fair (Me.), 397.

§ 868. **The same.** In a Kentucky case in reference to this question, Boyle, C. J., said, "This proposition cannot be maintained. Were the recovery of the specified thing the absolute and sole object of the action of *detinue*, the destruction of the thing would necessarily defeat the action; but as the object is to recover the thing only upon condition it can be had, and if not, then its value, it follows that the action cannot be defeated by the destruction of the thing, unless under circumstances which would excuse the defendant from responsibility. He who wrongfully detains the property of another does so at his peril, and will be responsible to the owner though the property should be destroyed by accident or taken from him by malice."¹

§ 869. **Death of slaves pending suit no defense to judgment for value.** This has been often held, and was the settled law when slaves were regarded as property.² In such cases the value of the use was allowed to time of death.³

§ 870. **The rule the same in case defendant keeps the property and gives a delivery bond.** In replevin, where the defendant has given a delivery bond for the property and retains it, and one of the horses dies in his hands, plaintiff's measure of damages for unlawful detention is the same as if the property had been preserved to abide the result. His undertaking is absolute to return the property in as good condition as when the action was commenced. His obligation is entirely different from that of a bailee rightfully in possession.⁴

¹ Carrel v. Early, 4 Bibb. (Ky.) 270. See Barksdale v. Appleberry, 23 Mo. 392; Rose v. Pearson, 41 Ala. 692; Feagin v. Pearson, 42 Ala. 335; Garrett v. Wood, 3 Kan. 231; Berthold v. Fox, 13 Minn. 501.

² White v. Ross, 5 Stew. & Porter (Ala.), 133; Bettis v. Taylor, 8 Por. (Ala.) 564; Bell v. Pharr, 7 Ala. 807; Lay v. Lawson, 23 Ala. 377; Carrel v. Early, 4 Bibb. 270.

³ Haile v. Hill, 13 Mo. 612; Rose v. Pearson, 41 Ala. 689; Bethea v. McLennon, 1 Ired. (N. C.) 523; Austin v. Jones, 1 Va. 341.

⁴ Hinkson v. Morrison, 47 Iowa, 167.

§ 871. **Emancipation of the slaves in dispute no defense**, as that is no reason why judgment should not be rendered for their value any more than if they had died.¹

§ 872. **Where property is hopelessly lost or destroyed**, judgment for its value may be rendered, and that the judgment for a return was not rendered is a harmless error.² Where the defendant in an action of replevin is successful, the measure of his recovery is not affected by the fact that a portion of the property has perished in plaintiff's hands.³

§ 873. **That plaintiff had delivered the property to a receiver of defendant does not lessen his liability**. Property having been taken by the plaintiff in replevin, and the defendant having been found to be the owner, and entitled to the possession, the plaintiff was not entitled to a mitigation of the recovery against him (of the value of the property) by reason of the fact that he had delivered a part of the property to a receiver of the defendant's vendor (appointed under the insolvent law subsequent to the sale).⁴

§ 874. **That a party has transferred his title may be shown in mitigation of damages**. The utmost that a party can claim who has transferred his title would be damages analogous to those rendered where the property has been restored and accepted. These would be nominal damages only, unless there has been some special damage caused by the taking and detention.⁵ Or that the plaintiff has become legally divested of title since the suit was brought, is a good defense except as to costs and damages up to that time.⁶

¹ Wilkerson v. McDougal, 48 Ala. 518; McIlvain v. Mudd, 44 Ala. 48.

² Brown v. Johnson, 45 Cal. 76; Wilkerson v. McDougal, 48 Ala. 518.

³ Lillie v. McMillan, 52 Iowa, 463 (3 N. W. 601). In Iowa the defendant can elect whether he will receive the property back or take the judgment for the value. Code, § 3241.

⁴ Yallop-De Groot Company v. M. & St. L. Ry., 33 Minn. 482 (24 N. W. 185). In this case the evidence did not show that, as between the receiver and the defendant, the receiver was entitled to the property.

⁵ Brady v. Whitney, 24 Mich. 154; Sedgwick on Damages, Ch. 19, "Mitigation." Deal v. Osborn, (Minn.) 43 N. W. 835.

⁶ Cole v. Conolly, 16 Ala. 271; Leonard v. Whitney, 109 Mass. 266.

Where the action is rightly brought, a subsequent delivery in good faith does not prevent recovery by the plaintiff for the damage of the detention before such delivery.¹

§ 875. **Possession of the property during the pendency of the suit may be shown in mitigation**, and should be considered in estimating the damages. If defendant win at first trial and property is delivered to him, and he convert it, but, on appeal by plaintiff, plaintiff is successful, such conversion by defendant may be considered in estimating the damages.²

§ 876. **Where successful party has become repossessed, his damages are what it cost him to get possession.** Where a sheriff wrongfully levies on and sells personal property, and the owner becomes the purchaser at such sale, and thus becomes repossessed of his property, in a suit by the latter for the wrongful taking and detention, the measure of his damages may be what it so cost him to regain the property, and the sheriff cannot object that the sum so paid at the sale exceeded the actual value of the property.³

§ 877. **Interest as a proper measure of damages.** In all cases where no special damages are shown, interest upon the value during the time the successful party was deprived of his goods is the proper measure of damages. In all cases of conversion, unless there is some particular reason to the contrary, interest is allowed as the measure of the damage.⁴

¹ *Hammer v. Wilsey*, 17 Wend. 92; *Vosburgh v. Welch*, 11 Johns. 175; *Gibbs v. Chase*, 10 Mass. 128; *Otis v. Jones*, 21 Wend. 394; *Hanselman v. Kegel*, 60 Mich. 540 (27 N. W. 678).

² *Deck v. Smith*, 12 Neb. 389 (10 N. W. 705).

³ *Leonard v. Maginnis*, 34 Minn. 506 (26 N. W. 733).

⁴ *Homer v. Hathaway*, 33 Cal. 119; *McDonald v. North*, 47 Barb. 530; *Wood v. Braynard*, 9 Pick. 322; *Twinam v. Swart*, 4 Lans. (N. Y.), 263; *N. Y. Guarantee Co. v. Flynn*, 65 Barb. 365; *Stevens v. Tuite*, 104 Mass. 333; *Bartlett v. Brickett*, 14 Allen, 64; *Huggeford v. Ford*, 11 Pick. 223; *Barnes v. Bartlett*, 15 Pick. 78; *Mattoon v. Pearce*, 12 Mass. 406; *Ormsby v. Vermont Copper Co.* 56 N. Y. 623; *Allen v. Fox*, 51 N. Y. 567; *Suydam v. Jenkins*, 3 Sandf. (N. Y.) 614; *Williams v. Phelps*, 16 Wis. 80; *Bonesteel v. Orvis*, 22 Wis. 522; *Bigelow v. Doolittle*, 36 Wis. 119; *Caldwell v. West*, 1 Zab. (21 N. J.) 411.

Where the wrong consists merely in the detention of property without waste or depreciation, or in the postponement of the parties' right of dominion over it, and its value did not consist in its use, interest is allowed, and is regarded a compensation for the wrongful detention.¹ These cases are on the theory that the property is not returned to the successful party—that is, they arise where the plaintiff took the property on his writ and on trial a return was awarded to defendant, and plaintiff failed to return; or where the defendant gave a bond and retained the property and on trial it was awarded to plaintiff, and defendant failed to return. If the value of the property was assessed as of the time of the taking, interest on that value is part of the damage, and should be entered in the judgment. If the property is returned to the successful party, the return of course cancels the judgment for value and interest, or, as the law is in some states, that part of the judgment never becomes operative. See Chapter XXXV.

§ 878. **Interest not allowed where the value is fixed at a time subsequent to the taking.** The value is usually fixed as of the time of the taking, and in that case interest is proper; but if the value is fixed as of a subsequent time, as at the time of the trial, it is not proper to allow interest on this value from the taking, for this would be allowing double damages.² Where the officer is authorized to seize the property and hold it for plaintiff to give bond, and, if bond be not given in a certain time, to return it, it is proper to allow interest upon the value, with any depreciation in value, together with the cost of replacing it.³ Where the plaintiff in replevin takes possession of the property when

¹ *Beals v. Guernsey*, 8 Johns. 446; *Bissell v. Hopkins*, 4 Cow. 53; *Hyde v. Stone*, 7 Wend. 354; *Jones v. Rahilly*, 16 Minn. 322; *Ripley v. Davis*, 15 Mich. 75; *Oviatt v. Pond*, 29 Conn. 479; *Derby v. Gallup*, 5 Minn. 119; *Scott v. Elliott*, 63 N. C. 215; *Robinson v. Barrows*, 48 Me. 186.

² *Atherton v. Fowler*, 46 Cal. 323; *Freeborn v. Norcross*, 49 Cal. 313.

³ *Morris v. Baker*, 5 Wis. 389.

the suit is commenced, and the jury on the trial find for the defendant, and assess the value at a time subsequent to the taking, they cannot add to this value as a part of the damage interest from the time of the taking up to the time the value was assessed.¹

§ 879. **The ordinary damage is the value at time of taking, with interest on that value.** In an action for unlawfully taking and detaining personal property, the ordinary measure of damages is the value of the property, with interest from the time of the taking.² Damages allowable are legal interest on the assessed (by the jury) value of the property from the date of its seizure to the date of trial.³ In an action to recover personal property or its value, interest on the value of the property is allowable, by way of damages for detention, from the date of the wrongful taking.⁴ In the absence of fraud, malice, negligence, oppression, or in absence of proof of the value of the use of the property, or of special damages, the measure of plaintiff's damages for the detention of the property by the defendant is the interest on the value of the property for the time wrongfully detained.⁵ If a finding in such an action state the value of the property, and the date of the taking, the plaintiff is entitled to interest on such value as damages, without a special finding to that effect, but he is not entitled to recover the money expended by him in pursuit of the property.⁶ In an

¹ *Atherton v. Fowler*, 46 Cal. 323.

² *Murphy v. Sherman*, 25 Minn. 196.

³ *Borse v. Thomas*, 3 Mo. App. 472; *Miller v. Whitson*, 40 Mo. 97; *Hutchins v. Buckner*, 3 Mo. App. 595.

⁴ *Schmidt v. Nunan*, 63 Cal. 371; *Kelly v. McKibben*, 54 Cal. 192; *Freeborn v. Norcross*, 49 Cal. 313; *Page v. Fowler*, 39 Cal. 412.

⁵ *Palmer v. Meiners*, 17 Kan. 486; *Bell v. Campbell*, 17 Kan. 213; *Ladd v. Brewer*, 17 Kan. 209; *Blackie v. Cooney*, 8 Nev. 41; *Berthold v. Fox*, 13 Minn. 501; *Mayberry v. Cliffe*, 7 Caldwell (Tenn.), 117; *Wood v. Braynard*, 9 Pick. 322; *Allen v. Fox*, 51 N. Y. 565.

⁶ *Kelly v. McKibben*, 54 Cal. 192. In this state the statute makes a distinction between an action to recover possession of personal property with damages for its detention, and one to recover damages for its

action of replevin, where plaintiff fails to get the property, he cannot have judgment for the value in a gross sum and also damages in the form of interest on the value of the property from the time it was taken.¹ The general rule is, where a party has a judgment in his favor for the caption and detention of goods replevied, that he is entitled to damages for such unjust detention, and interest on their value ordinarily forms the measure of damages.² The successful party, in case a recovery of the property cannot be had, is entitled to its value at the time of the trial, and not at any intermediate time between the taking and the trial. If the value has been impaired during the detention, it should be included in the assessment of the damages caused by the detention. In the absence of any proof that the damages are more or less than the interest on the value, the presumption is that the damages are the interest during the time that the successful party was wrongfully deprived of the use.³

§ 880. **Where property is not taken, the rule is ordinarily the value with interest.** Where plaintiff in replevin did not get the property on his writ, and the action proceeded as an action for damage, by statute, and the jury found the right of possession in the plaintiff at the commencement, *held*, that the measure of damages was the value of the property as proved, together with lawful interest thereon from the date of the unlawful taking thereof to the first day of the term of court at which the trial was had.⁴

§ 881. **The rule the same as in trover.** In replevin, where plaintiff elects to take the value of the property with

wrongful conversion, and the rule of damages is fixed by statute. Sec. 3336, Civil Code, and Sec. 667, Code of Civil Procedure.

¹ Freeborn v. Norcross, 49 Cal. 313. See note to last case.

² Graves v. Sittig, 5 Wis. 219; Booth v. Ableman, 20 Wis. 633.

³ New York G. & I. Co. v. Flynn, 55 N. Y. 653; Twinam v. Swart, 4 Lans. (N. Y.) 263.

⁴ Hainer v. Lee, 12 Neb. 452 (11 N. W. 888). The interest on all claims is computed to the first day of the term at which rendered by statute, and judgments draw interest from that day.

damages for the detention, the rule of damages should be the same as in trover. Where the damages were assessed as of the time of the taking, the damages for detention should be interest on the value of the property so assessed from the taking to the verdict.¹ Where the action is for the conversion of the property and in the nature of trover, it is unquestioned that the measure of damages is, ordinarily, the value at the time of the conversion and interest.² Where the property is awarded to defendant on trial, but can not be returned, the analogy of trover is followed, and the measure of damages is the value of the property at the time of taking, with interest thereon.³

§ 882. **Interest is not in the nature of special damages.** Interest from the time of taking may always be given as damages, without proof of special damage.⁴

§ 883. **If property returned, interest no part of the damage.** When the defendant gets the property back he does not get interest on the property, or if the property is returned, he is not entitled to its value too; therefore, if the property is restored to the defendant, he is entitled to the damages assessed, but not to interest upon the assessed value of the property. In other words, the judgment for value and interest is defeated and discharged by delivery of the property.⁵ Where the jury find the right of possession in the defendant, it is error to allow interest on the ac-

¹ *Bigelow v. Doolittle*, 36 Wis. 115.

² *McDonald v. North*, 47 Barb. 530; *Forsythe v. Wells*, 41 Pa. St. 291; *Suydam v. Jenkins*, 3 Sandf. 614; *Single v. Schneider*, 30 Wis. 572; *Sedgwick on Measure of Damages*, Ch. 19, p. 474. But see *McGavock v. Chamberlain*, 20 Ill. 220; *Allen v. Fox*, 51 N. Y. 564.

³ *Dodge v. Runnels*, 20 Neb. 33 (28 N. W. 849); *Berthold v. Fox*, 13 Minn. 462; *Garret v. Wood*, 3 Kas. 231; *Sedgwick on Damages* (6 Ed.), 624; *Hurd v. Gallaher*, 14 Iowa, 394.

⁴ *Blackie v. Cooney*, 8 Nev. 41; *Beals v. Guernsey*, 8 J. R. 446; *Hyde v. Stone*, 7 Wend. 354; *Burrill v. Hopkins*, 4 Cow. 53; *Devereux v. Burgmin*, 11 Ired. 490; *McDonnell v. North*, 47 Barb. 530; *Ripley v. Davis*, 15 Mich. 75; *Robinson v. Burrows*, 48 Me. 186; *Oviatt v. Pond*, 29 Conn. 479; *Derby v. Gallup*, 5 Minn. 119.

⁵ *Smith v. Roby*, 6 Heis. (Tenn.) 546.

tual value of the property as a part of the damage.¹ In replevin, damages other than legal interest on the value of the property as found, for the detention of the property, are recoverable only in case of a return. If the property is not returned, the measure of damages is the value of the property as proved, together with lawful interest thereon, from the date of the unlawful taking.² In Kentucky, if the value of the property does not exceed the execution, the damages allowed the plaintiff are the value of the property, with ten per cent thereon, as a penalty, and legal interest from the levy of the writ, and costs.³

§ 884. **Interest on the value has been held to be discretionary with the jury.** Where the goods were not taken under the writ, the value of them when they were taken by the defendants is the measure of the damages the plaintiff is entitled to recover in the action, and it is in the discretion of the jury to allow him interest thereon if they see proper.⁴ In an action of claim and delivery, interest is not allowed as a matter of law, but it is discretionary with the jury to allow as damages interest on the value from the time of the taking.⁵

§ 885. **Interest and profits both cannot be allowed as damages.** Interest is allowed as a legal compensation for lost use. If it is competent to show greater damage than the interest would cover, then interest is no longer an element of damage in that particular case.⁶ Where use is allowed, it excludes other compensations during the time for which it is allowed. Where the property is valuable for use, plaintiff may recover the value of the use during the

¹ *McCarty v. Quimby*, 12 Kan. 494. By statute the defendant may give bond and keep the property. Compiled Laws, 1885, § 3981.

² *State v. Kinkaid*, 23 Neb. 641 (37 N. W. 612); *Romberg v. Hughes*, 18 Neb. 579 (26 N.W. 351).

³ *Yantes v. Burditt*, 2 Dana (Ky.), 254.

⁴ *Boyce v. Cannon*, 5 Houst. (Del.) 409.

⁵ *Patapsco v. Magee*, 86 N. C. 350.

⁶ *McGuire v. Galligan*, 53 Mich. 453 (19 N. W. 142).

time he was deprived of it, but not also the natural depreciation in value during the same time. If the property is incapable of use, the depreciation in value becomes an element in fixing the damages. Where use is allowed, it excludes interest and other compensations.¹

§ 886. **Interest not always a proper measure of damages.** Where the property is capable of physical use or enjoyment, the damages are interest upon its use to the time of the rendition of the verdict in the replevin suit, or compensation for their use and enjoyment when that exceeds interest.² It is true that interest on the value of the property wrongfully detained is sometimes, in replevin cases, considered as the proper measure of damages, but it never was considered as the only damages which might be allowed in replevin cases, and in the nature of things it should not be. In some cases, deterioration of the property from injury, neglect, etc., etc., while wrongfully detained, must be considered as an element in the allowance of damages. In other cases the decrease in the market value of the property must be taken into consideration. In a few cases gross malice, fraud, and oppression may be taken into consideration.³

§ 887. **Interest not the measure of damages where property has a usable value.** The question of proper damage for the detention of usable property was before the Nebraska court in a case where the jury found the value of the property (horses, harness, and wagon) to be \$285, and assessed the damages for the detention at \$1 per day—in all, \$584—upon which the following judgment was rendered:

¹ Odell v. Hole, 25 Ill. 208; Garrett v. Wood, 3 Kan. 231; Johnson v. Weedman, 4 Scam. 496.

² Washington Ice Co. v. Webster, 62 Me. 341.

³ Bell v. Campbell, 17 Kan. 211; Herdick v. Young, 55 Pa. St. 176; Cable v. Dakiu, 20 Wend. 172; Allen v. Fox, 51 N. Y. 562; Morgan v. Reynolds, 1 Mont. 163; Butler v. Mehrleing, 15 Ill. 488; Robbins v. Walters, 2 Texas, 130; Dorsey v. Gassaway, 2 Har. & Johns. 402, 413; Gibbs v. Cruikshank, 8 C. P. 454; Williams v. Phelps, 16 Wis. 81; Glasscock v. Hayes, 4 Dana (Ky.), 58; Hall v. Edrington, 8 B. Mon. (Ky.) 47; Hudson v. Young, 25 Ala. 376; Stevens v. Tuite, 104 Mass. 328.

“That the defendant have a return of the property taken on
“said writ of replevin, or in case a return of said property
“cannot be had, that he recover of said plaintiff the value
“thereof, assessed at \$285, and his damages for withhold-
“ing the same, assessed at \$584 and costs of suit, taxed at
“\$431.83. In reviewing this case, Mr. Justice Maxwell,
speaking for the court, says: “It is only in cases where a
“return of the property is had that the party to whom the
“property is returned is entitled to damages for the deten-
“tion. The rule allowing the value of the use is peculiar to
“replevin, and grows out of the fact that the party to whom
“the property is awarded seeks to recover the property it-
“self, and not its value. In such case, where the property
“is returned, the party to whom the return is made is en-
“titled to the damages awarded for the detention. If, how-
“ever, a verdict is rendered for the value of the property,
“the action in that regard being one for damages only, the
“measure of damages is the value of the property as proved,
“together with lawful interest thereon from the date of the
“unlawful taking. The judgment in this case is clearly er-
“roneous. For property of the value of \$285, the defend-
“ant is awarded a judgment for \$869, in case no return is
“had, and \$584 for the detention of the property, if it is re-
“turned. Such a judgment ought not to be sustained, and
“the damages for the detention are excessive. These are
“simply for the use of the property. There is no claim that
“the property deteriorated in value during the time the
“plaintiff had possession of the same. It is not very prob-
“able that property of the value of \$285 produced, during
“the time it has been in the plaintiff’s hands, profits of the
“net value of more than twice that sum. Such a verdict
“and judgment are greatly in excess of the actual damages
“sustained. The amount of recovery for the detention of
“property should ordinarily, where there is no deterioration,
“bear a reasonable proportion to the value of the same;
“otherwise, the judgment cannot be sustained. The judg-

"ment of the district court is reversed, and the defendant "has leave within twenty days to remit from the amount "claimed for the detention of the property all but the sum "of \$200; and in case such remittance is entered as above "provided, judgment will be entered in this court as follows: "In favor of the defendant for a return of the property, and "\$200 for the detention of the same, or, in case a return "cannot be had, that he recover of the plaintiff the sum of "\$285, with interest from the taking."¹ In the absence of malice the courts are not disposed to allow vindictive damages, but to make the damages compensatory only. In the case of work cattle or horses, tools, or implements of trade or husbandry, taken from the owner, who is thereby deprived of their use, the reasonable value of that use will, in most cases, be the only just compensation for their detention.²

§ 888. **The same.** Where the plaintiff is deprived of the use of specific personal property, he would naturally recover the value of the use, and in case of certain articles of special value in use, this must be a basis of recovery. But in case of ordinary articles of personal property having no such special value, the measure of damages for detention, where there is no depreciation, is legal interest on the value of the property from the date of the plaintiff's demand to the date of the taking under the writ. If the verdict, on the other hand, is for the defendant, the measure of damages is the value of the property at the time of the officer's taking, and legal interest on that amount to the date of trial.³ Upon defendant's recovery in an action of replevin, there is no

¹ *Romberg v. Hughes*, 18 Neb. 579, citing *Hainer v. Lee*, 12 Neb. 452; *Dick v. Smith*, 12 Neb. 389. But see *Minthon v. Lewis*, (Ia.) 43 N. W. 465.

² *Allen v. Fox*, 51 N. Y. 562; *Machette v. Wanless*, 2 Col. 180; *Morgan v. Reynolds*, 1 Blake (Mont.), 164; *Clements v. Glass*, 23 Ga. 395; *Clapp v. Walters*, 2 Texas, 130; *Carroll v. Pathkiller*, 3 Port. (Ala.) 281; *Dorsey v. Gassaway*, 2 Har. & J. 402; *Hanauer v. Bartells*, 2 Col. 524; *Fralick v. Presley*, 29 Ala. 463.

³ *Shenuit v. Brueggstradt*, 8 Mo. App. 46; *Miller v. Whitson*, 40 Mo. 97; *Hutchins v. Buckner*, 3 Mo. App. 594.

warrant for adding interest by way of damages to the value of the property.¹ The ordinary measure of damages for the plaintiff in replevin, as to property which has no usable value except for consumption, in the absence of proof of special damage, is legal interest on the value of the property, in addition to the property itself or its value. But as to property having a usable value by way of bailment for hire, like horses or tools, the measure is the value of the use during the detention. The loss of a job by the taking and detention of one's tools is too remote as an element of damages.² The measure of the plaintiff's damages is the interest on the value of the property while in the defendant's possession, unless the proofs show that the use of the property was of greater value than such interest, during the time the plaintiff was deprived of the same, or that the value of the property depreciated during that time.³

§ 889. **Excessive damages must not be allowed for use,** and all the facts should be considered. If excessive damages are given for use, they will be set aside.⁴ A verdict for damages for the use of property five-fold more than its value is excessive, and will be set aside.⁵ Damages for the use of wagon and buggy, taking into account what part of the year the same would be used, *held*, erroneous.⁶ The measure of damages where property is wrongfully taken from one's possession by a writ of replevin is the value of the use of such property during its detention, to be estimated by the ordinary market price of the use of such property, and is not

¹ *Andrews v. Costican*, 30 Mo. App. 29. This does not refer to the doctrine just laid down, or the cases cited there, and from the cases cited in this opinion do not think it was intended to overrule the *Shenuit* case *supra*.

² *Kelly v. Altemus*, 34 Ark. 184; *Allen v. Fox*, 51 N. Y. 562; *Sedg. on Measure of Damages*, 650; *Minkwitz v. Steen*, 36 Ark. 260.

³ *Keep v. Kauffman*, 38 N. Y. Sup. Ct. 476.

⁴ *Romberg v. Hughes*, 18 Neb. 579.

⁵ *Anchor Milling Co. v. Walsh*, 24 Mo. App. 97.

⁶ *Bigelow v. Doolittle*, 36 Wis. 115.

what might have been earned by defendant in the use of the property during that time.¹

§ 890. **The purpose for which property is used should be considered in estimating the value of use.** Where the property is domestic animals, valuable for service only, the value of the use of the animal is, of course, the measure of compensation. Legal interest is not compensation. Where the article is intended for consumption, interest upon the value of it would seem to be the true compensation.² Interest on the value from the time of the wrongful taking is the proper measure of damages where the property is merchandise kept for sale, or grain and other articles useful only for sale and consumption.³ But where its chief value is in its daily use, the real measure of damages is the value of the use, and interest on the value of the property is not compensation.⁴ Where plaintiff replevies household goods in daily use, and fails in his action, interest on the value is no criterion of the damages sustained by the defendant by reason of being deprived of the use of it. It is evident that the restoration of the property, with interest on its value, would not furnish an adequate indemnity to the defendant for the wrong done in taking it out of his possession. The defendant is entitled to recover, as damages, such sum as will be a fair indemnity to him for the injury he has sustained by reason of the unlawful taking and detention.⁵ The jury should consider the nature and purpose for which the property was used by defendant, in assessing his damages.⁶ In

¹ *Stanley v. Donohoe*, 16 Lea. (Tenn.) 492; *Anchor Milling Co. v. Walsh*, 24 Mo. App. 97. *Minthorn v. Lewis*, (Iowa) 43 N. W. 465.

² *Machette v. Wanless*, 2 Col. 169. See Sedg. on Damages (5th Ed.), 582; *Morgan v. Reynolds*, 1 Mont. 163; *Butler v. Mehrling*, 15 Ill. 488; *Greenl. on Evi.*, Vol. 2, p. 276.

³ *Hanauer v. Bartels*, 2 Col. 515; *Allen v. Fox*, 51 N. Y. 565; *Suydam v. Jenkins*, 3 Sand., S. C. R., 614; *Brizsee v. Maybee*, 21 Wend. 144.

⁴ *Williams v. Phelps*, 16 Wis. 83.

⁵ *Boston Loan Co. v. Myers*, 143 Mass. 446 (9 N. E. 805); *Stevens v. Tuite*, 104 Mass. 328.

⁶ *Clark v. Martin*, 120 Mass. 543.

replevin for a boat wrongfully taken by the defendant, the measure of damages is a fair and reasonable compensation for its use, with such special damages as are known and necessarily accompanied the detention, and any actual injury occurring to the property. Such compensation cannot be determined by the prospective profits which the owner would have derived from the use of the boat, contingent upon his chance of business.¹

§ 891. **The usable value a proper element of damages.** In the case of property having a rental value, the successful party has a right to the value of this use from the time he was deprived of it to the day of trial.² In an action of claim and delivery, the value of the use of the property during its wrongful detention may properly be shown and considered in the matter of damages.³ Such damages should be specially pleaded. Where the property has a usable value, the value of its use during the time of its detention is a proper item of damages.⁴ Where the value of the property is assessed as of the time of the wrongful taking, it is not improper to allow the value of the use of the property as damages for the wrongful detention in any case in which it does not appear that the property is of such a nature that it necessarily or in fact perishes, or wears out, or becomes

¹ *Aber v. Bratton*, 60 Mich. 357 (27 N. W. 564); *Allis v. McLean*, 48 Mich. 428; *McKinnon v. McEwan*, 48 Mich. 106; *Hart v. Blake*, 31 Mich. 278; *Allison v. Chandler*, 11 Mich. 554; *Talcott v. Crippen*, 52 Mich. 633; *Allen v. Fox*, 51 N. Y. 562; *Smith v. Griffith*, 3 Hill, 333; *Durst v. Burton*, 47 N. Y. 175; 2 *Sutherland on Damages*, 374; *Mayberry v. Cliffe*, 7 Coldw. 117; *Barney v. Douglass*, 22 Wis. 464; *Carter v. Carter*, 36 Mich. 207; *Sirrine v. Briggs*, 31 Mich. 443; *Butler v. Collins*, 12 Cal. 457; *Brannin v. Johnson*, 19 Me. 361; *Houghton v. Rock*, 8 Phil. 42; *Butler v. Mehrling*, 15 Ill. 490.

² *Chauvin v. Valiton*, 8 Mont. 451 (20 P. 658). The property was a piano, and it was shown that its rental value was \$10 per month, and this was allowed as value for use instead of interest.

³ *Ferguson v. Hogan*, 25 Minn. 135.

⁴ *Allen v. Fox*, 51 N. Y. 562; *Clapp v. Walter*, 2 Texas, 130; *Darby v. Cassaway*, 2 Harris & J. 413; *Butler v. Mehrling*, 15 Ill. 488; *McGavick v. Chamberlain*, 20 Ill. 219.

impaired in value in the using.¹ In an action of replevin, where the property in controversy has a usable value, the value of the use of such property during the time of its wrongful detention may be recovered as proper damages.²

§ 892. **Damages for use need not be specially claimed.** In replevin the plaintiff may, without alleging special damages, recover such damages for the detention of the property as the jury, upon all the evidence, may be satisfied that the use of the property, considering its nature and character, was worth to him during the time of detention.³ Where the value of the use of property is the proper basis for the assessment of damages for the detention, and no special use is suggested, and only the ordinary value of the use of such property claimed, *held*, that the loss of such value was the natural and necessary result of the detention, and that such value might be proved and recovered under a general allegation of damages, and without any averments of special damage.⁴ No ground for exemplary damages being shown, it is error in the court to charge that in addition to actual damages for detention the value of the use of the property can be recovered. In such cases the measure of damages is ordinarily the interest upon the value of the property from the time of the taking to the time of assessment, and where loss of use is claimed, it should be allowed as part of the actual damage, and not in addition thereto.⁵

§ 893. **Damages for use cannot be recovered in a separate action.** Damages for use may be recovered in the replevin suit or the suit on the bond, but the recovery of statutory damages precludes the defendant from recovering interest on the value of the property for the same period.⁶

¹ *Sherman v. Clark*, 24 Minn. 37.

² *Yandle v. Kingsbury*, 17 Kan. 195; *Kennett v. Fickle*, (Kan.), 21 P. 93. On this subject see the leading case of *Allen v. Fox*, 51 N. Y. 562.

³ *Clark v. Martin*, 120 Mass. 543.

⁴ *Ladd v. Brewer*, 17 Kan. 204; *Bell v. Campbell*, 17 Kan. 211.

⁵ *Twinam v. Swart*, 4 Lans. (N. Y.) 263.

⁶ *Tremon v. Morris*, 9 Bradw. (Ill.) 237.

Damages for use must be recovered in the replevin action. A separate action cannot be maintained for such damages.¹

§ 894. **Plaintiff cannot have damages for the use and for the value too.** In an action of replevin where the property is not found, and the plaintiff elects to take judgment for its value, the measure of damages is such value at the date of conversion, and interest thereon to the date of the verdict. A plaintiff in replevin cannot elect to treat the title to the property in dispute as having passed to the defendant by proceeding for its value, and at the same time claim the use of it as if it were his property. In replevin the law usually, as in other actions in the absence of fraud or malice, aims at a just compensation in damages, the object being to restore the plaintiff, as far as possible, to the condition he was in before the commission of the act complained of.²

§ 895. **One who has no right to use the property as a pledgee or an officer cannot recover for the use,** and a judgment allowing such a person the value of the use as part of the damages is erroneous.³ A deputy sheriff who has seized goods under an attachment has no right to make use of them while holding them, and, therefore, when he prevails in an action of replevin, he has no right to damages for being deprived of their use.⁴ When a replevin suit is dismissed, and the court proceeds to assess the defendant's damages for the detention of the property, it is competent for the plaintiff to prove that the defendant is the mere pledgee of the property to secure a debt from the plaintiff, as in such case the defendant would not be entitled to recover anything for the value of the use of the property.⁵ The value of the use of

¹ Davis v. Fenner, 12 R. I. 21.

² Hauselman v. Kegel, 60 Mich. 540 (27 N. W. 678); Cow. Treat. (5th Ed.) Sec. 622; McGavock v. Chamberlain, 20 Ill. 220; Garrett v. Wood, 3 Kan. 231; Brewster v. Silliman, 38 N. Y. 423; Brizsee v. Maybee, 21 Wend. 144.

³ McArthur v. Howett, 72 Ill. 359; Twinam v. Swart, 4 Lans. 263; Broadwell v. Paradise, 81 Ill. 474.

⁴ Tandler v. Saunders, 56 Mich. 142 (22 N. W. 271).

⁵ McArthur v. Howett, 72 Ill. 358.

personal property, as special damage for its detention, can only be recovered by one who has a right to such use. A mortgagee after default in the mortgage has a right to the possession only for the purpose of foreclosure or sale under the mortgage in order to satisfy the debt secured by it, and not for the purpose of using the property.¹

§ 896. **If one without any right replevy the property, the rule is different.** Where property levied on by an officer under an execution is taken from him on a writ of replevin, at the suit of a stranger, and afterwards the replevin suit is dismissed and a return of the property awarded, the court should assess the officer's damages for the detention at whatever the use of the property was worth for the time it was detained. The officer would have a right to the entire value of the property as against a stranger, and would hold that and the damages subject to the order of the court issuing the execution.² One who institutes an unfounded suit in replevin may incur damages as against the defendant, even though the latter does not own the property. Damages allowed the defendant may include the value of the use of the property while it is kept from him by means of the replevin proceedings.³

§ 897. **The party claiming the use must show that he was in position to use it,** and that he had a right to use it, and would have used it if not interfered with by the unlawful taking. It is only for the loss of the use of property which the party is in a situation to use, and can use, that the value of the use is allowed,⁴ and it must also be shown that the property is valuable for use.⁵

¹ Thompson v. Scheid, 39 Minn. 102 (38 N. W. 801).

² Broadwell v. Paradise, 81 Ill. 474. See Wilbraham v. Snow, 2 Saund. 47; Russell v. Butterfield, 21 Wend. 300; Brownell v. Manchester, 1 Pick. 232; White v. Webb, 15 Conn. 502; Fallon v. Manning, 35 Mo. 271; Frei v. Vogle, 40 Mo. 149.

³ Burt v. Burt, 41 Mich. 82.

⁴ Barney v. Douglass, 22 Wis. 464.

⁵ Hanauer v. Bartels, 2 Col. 515; Machette v. Wanless, 2 Col. 170;

§ 898. **Interest may be allowed on the usable value.** In case where the use of the property is of no special value, interest upon its value should be allowed as a compensation for the deprivation of the investment of the property. Where the property is of greater value at the date of the order for a return than it was at the time of the replevin, the defendant should be allowed for such increased value of the property when taken, and the interest thereon.¹

§ 899. **Measure of damages as between vendor and vendee.** Where a vendor brings replevin against his vendee, who has made default in payments, the measure of damages is the value of the use of the property from the time it was illegally refused to be surrendered to the vendor till the rendition of the verdict of the jury, excluding any compensation for the use of the property while the vendee held it legally, and abating nothing from the damages because of payments in work or otherwise made by the vendee to the vendor for the property under the contract.²

§ 900. **Measure of damages in suit for promissory note, or other evidence of debt.** The general rule in case of a note is, that the damages are the actual value of the note and not its face value, or the amount purporting to be due on it.³ In the case of a city order converted by defendant, *held*, that plaintiff was entitled to recover its full value, but not its face value, as it could not be collected from the corporation until money was on hand to pay it.⁴ If no question is raised on that point, the damage is *prima facie* the face of the note and bill, but the insolvency of the signer or a partial payment, or any other facts going to reduce its real value, may be shown, the intention of the law being to

Allen v. Fox, 51 N. Y. 564; Goulet v. Asseler, 22 N. Y. 225; Clark v. Pinney, 7 Cow. 681; Shepherd v. Johnson, 2 East. 211; Bonesteel v. Orvis, 22 Wis. 522.

¹ Truman v. Morris, 9 Bradw. (Ill.) 237.

² McGinnis v. Savage, 29 W. Va. 362 (1 S. E. 746).

³ Turner v. Retter, 58 Ill. 264.

⁴ Terry v. Allis, 16 Wis. 479; Id. 20 Wis. 32.

indemnify the party against his actual damages, and no more.¹ Where a bankrupt gave a check to one of his creditors, which was paid by the bank upon which it was drawn, the assignee brought trover and obtained a verdict for the full amount of the check on the ground that the bankrupt had nothing to draw a check against, his property belonging to his assignee. The verdict was set aside, the court saying, "the plaintiff proceeds on the ground that the check, 'being drawn by a bankrupt, was worthless. If the position taken be true, how can he recover £300 on it?'"² The measure of damages in an action of replevin for a county warrant is legal interest thereon for the time of the unlawful detention.³

§ 901. In case of stocks is the value on day of trial. Although the rule in trover is to allow as damages the market value of the stocks on the date of conversion, such is not the rule in replevin for the stocks, but the proper measure of damages in such a case is the value of the stocks on the day of trial, together with the dividends that have been paid upon it.⁴

§ 902. Where it has been decreased in value by the act of the defeated party, he is responsible for that loss. Thus, if he has mutilated the note or altered it, the loss must be made good.⁵ Or where the defendant has received a payment on a note while he held it and endorsed it thereon, this does not decrease his liability unless he bring the money

¹ *Potter v. Merchants' Bank*, 28 N. Y. 641; *Am. Exp. Co. v. Parsons*, 44 Ill. 318; *Keaggy v. Hite*, 12 Ill. 99; *Menkens v. Menkens*, 23 Mo. 252; *Ingalls v. Lord*, 1 Cow. (N. Y.) 240; *Robbins v. Packard*, 31 Vt. 570.

² *Matthew v. Sherwell*, 2 Taunt. 439.

³ *McCoy v. Cornell*, 40 Iowa, 457. *Query*—Would this be the rule if there were no funds to pay the warrant in the hands of the county treasurer?

⁴ *Bercich v. Marye*, 9 Nev. 312. This is on a statute which provides that full indemnity shall be made. See *Corn Ex. Bank v. Blye*, 7 N.Y. S. 434.

⁵ *McLeod v. McGhie*, 2 M. & G. (40 E. C. L.) 326; *Am. Exp. Co. v. Parsons*, 44 Ill. 318.

into court and offer to return it.¹ As a rule, nothing done by the party while in possession can be to his advantage in reducing damages for which he is liable.²

§ 903. **In the case of keepsakes, souvenirs, etc.** If the subject of the action is articles of peculiar value, *pretium affectionis*, and there is a failure to recover the specific article, the damages would not always be limited to its actual commercial value, but its value to the party entitled thereto, the rule in this respect being the same as in the action of trover.³ In *Suydam v. Jenkins*, Chief Justice Duor says, "In most cases the market value of the article is the best "criterion of its value to the owner, but in some cases its "value to the owner may greatly exceed the sum that any "purchaser would be willing to pay. The value to the owner "may be enhanced by personal or family considerations, as "in the case of family pictures, plate, etc., and we do not "doubt that the *pretium affectionis*, instead of the market "price, ought then to be considered by the jury or court in "estimating the value."⁴ In such cases it is difficult to fix the value, and no rule has been given by the courts. It is left to the discretion of the jury to do what in their judgment is proper under all the circumstances, as no money can compensate for the loss of family relics or keepsakes, and as their taking is nearly always with malice, the jury should be liberal in the allowance of damages, but should not be influenced by passion. Damages and proof of value of vouchers and papers and property which have no market value must largely depend upon plaintiff's evidence. The value of such property is governed largely by the purpose for which they may be used by plaintiff and his needs, and

¹ *Alsayer v. Close*, 10 Mees. & W. 576.

² *Carter v. Streator*, 4 Jones (N. C. L.), 62.

³ 2 Pars. on Contracts, 196; Sedg. on Damages, 474, 431; Eggleston on Damages, 302; Southerland on Damages, 540-1, 561.

⁴ *Suydam v. Jenkins*, 3 Sandf. (N. Y.) 621; *Whitfield v. Whitfield*, 40 Miss. 368; *France v. Gaudet*, 6 Q. B. L. R. (Eng.) 199.

much must be left to the sound discretion of the jury in such cases.¹

§ 904. **Damages to compel return.** Where the property has a special or peculiar value to one party above the ordinary value, or where the evident intention of one party is to keep the property, whether awarded to him or not, it is in the province of the jury to place a value upon it that will compel a return.² This rule, while of great advantage in some cases, is liable to abuse, and should only be applied in cases where the property can be returned, but there is a disposition apparent not to return it at the ordinary valuation.

§ 905. **Measure of damages as between joint owners.** While one joint owner cannot maintain replevin against another, such cases sometimes arise and must be disposed of. As a general rule, the defendant who recovers because of the joint tenancy is entitled to be restored to the same position he was before the illegal attempt to interfere with his possession, and the court should return the property to the possession it was in. But on the question of damages, where the property cannot be returned, the defendant is not entitled to more than the value of his interest.³

§ 906. **The damage for property severed from real estate** is measured not by its value as a part of the real estate, but by its value after severance as personal property. If the plaintiff desire to get its value as part of the real estate, his remedy is to sue for the trespass. By bringing replevin he admits that it is personal property. In an action of replevin for the materials which, before the removal, com-

¹ Drake v. Auerbach, 37 Minn. 505 (35 N. W. 367); Bradley v. Gammelle, 7 Minn. 260; Stickney v. Allen, 10 Gray, 352.

² Mayberry v. Cliffe, 7 Cold. (Tenn.) 120; Goodman v. Floyd, 2 Humph. (Tenn.) 60; Cochran v. Winburn, 13 Texas, 143.

³ Bartlett v. Kidder, 14 Gray (Mass.), 449; Sutcliffe v. Dohrman, 18 Ohio, 185; Reynolds v. McCormick, 62 Ill. 412; Witham v. Witham, 57 Me. 448; Spoor v. Holland, 8 Wend. 445; Jones v. Lowell, 35 Me. 538; Mason v. Sumner, 22 Md. 312; Ingersoll v. Van Bokkelen, 7 Cow. 670. See Ferguson v. Rafferty, (Pa.) 18 A. 484; Titsworth v. Frauenthal, (Ark.) 12 S. W. 498.

posed a fence attached to and made a part of the realty, the plaintiff can recover only the value of the materials after their removal, and not the value of the fence as it stood before the removal.¹ On the other hand, where a suit was brought for rails, and before they were taken under the writ they were built into a fence attached to the land, *held*, that the sheriff could not take the fence, and the plaintiff should recover the value of the rails, not of the fence.² And where A employed a builder to furnish materials and build a house on his lot, and was to pay for it by conveying another lot, and the builder sold it to a person who moved it on to his own land, and placed a foundation under it, A sued the purchaser and builder in replevin, *held*, that the house had become real estate, and that the plaintiff was entitled to the value.³ In trover for the conversion of logs by mistake, the court *held* the measure of damages should be a sum sufficient to compensate the party for the injury he had sustained.⁴ The value of property at the place where found is the proper measure of damages in trover, but in *trespass de bonis asportatis* for cutting timber, the logs having been hauled to certain landing, the court allowed only the value at the place where they were cut.⁵ It will be seen that the damages in this class of cases varies somewhat with the form of action in which plaintiff seeks his remedy.

§ 907. Measure where property has been severed and increased in value by defendant acting in good faith. Where a defendant committed a trespass in an honest mistake of fact, in cutting timber into logs and rafting them to a distant market, where they were replevied, and he gave

¹ Pennybecker v. McDougal, 48 Cal. 160. In this case the fence was worth \$200, but the material, after severance, was only worth \$75.

² Bower v. Tallman, 5 W. & S. (Pa.) 561.

³ Reese v. Jared, 15 Ind. (Harrison) 142.

⁴ Winchester v. Craig, 33 Mich. 206; Northrup v. McGill, 27 Mich. 238.

⁵ Cushing v. Longfellow, 26 Me. 307. On this subject see Forsyth v. Wells, 41 Pa. St. 291; Wood v. Morewood (43 E. C. L.), 3 Adolp. & E. 440; Hungerford v. Redford, 29 Wis. 345; Young v. Lloyd, 65 Pa. St. 204.

bond and retained them and suit went against him, *held*, the proper measure of damages was the value of the logs at the boom at the time of replevying, deducting all that it had cost defendant to cut, haul, and drive the logs to the boom.¹ In England this question arose in trespass for the taking of coal, and the value was estimated at the value when severed from the realty, and not when in the mine.² In Illinois the court followed these cases and gave the value at the mouth of the pit, less the cost of placing it there, but allowing nothing for the digging.³

§ 908. **A willful trespasser not entitled to anything for his labor.** Thus, where a trespasser cut wheat on another's land, he cannot deduct for the labor of cutting, but must give the owner the value of the wheat, as though he had harvested himself.⁴ Because a wrong has been done to the plaintiff, it will not mend the matter to inflict another wrong on the defendant. The law rather aims to protect the plaintiff, but at the same time to inflict no unnecessary injury on the defendant, and where the injuries are susceptible of a full and definite money compensation, the law will not abandon a certain rule which will do complete justice for an uncertain rule which can hardly fail to do injustice.⁵ Full compensation should be the limit of damages in replevin.

§ 909. **General rule of damage where property has been changed in form.** It is generally and perhaps always true, so long as identification is practicable, or until the original property taken becomes of insignificant importance in comparison with the article in its improved and altered condition, that the owner is entitled to that of which he has been

¹ *Herdic v. Young*, 5 P. F. Smith (Pa.), 176; *Craig v. Kline*, 65 Pa. 400.

² *Martin v. Porter*, 5 Mees. & W. 353; *Morgan v. Powell*, 3 Adolp. & E. (43 E. C. L.) 278; *Wild v. Holt*, 9 Mees. & W. 672.

³ *I. & St. L. R. R. & Coal Co. v. Ogle*, 82 Ill. 627; *Robertson v. Jones*, 71 Ill. 405; *McLean County Coal Co. v. Long*, 81 Ill. 359.

⁴ *Bull v. Griswold*, 19 Ill. 631.

⁵ *Warren v. Cole*, 15 Mich. 271; *Winchester v. Craig*, 33 Mich. 205.

wrongfully deprived without making compensation to the wrongdoer for his expenditure, for the reason that as a rule the property to which he is entitled and of which he has been deprived without fault on his part, cannot be separated from that portion which is not in fact his, and in order to obtain the former he is compelled to take the latter. Under such circumstances the wrongdoer must lose, and the rightful owner gain. But when compensation in money is to be given for the property taken, together with damages for the taking and withholding the same, or for the value of its use, a different rule should in reason and justice be followed. In such cases the rights of the respective parties can in most cases be fully protected without detriment or loss to either, and where possible this should be done.¹ The leading case in this country on this subject is *Silbury v. McCoon*, 3 N. Y. 379, where a trespasser took corn and converted it into whisky, and trover was brought for the whisky, and it was held by a majority of the court that the owner of the corn could get the whisky. I append the decision of the court by Ruggles, J., but for argument of counsel and minority opinion, which are very fine, refer the reader to the report.

It is an elementary principle in the law of all civilized communities that no man can be deprived of his property except by his own voluntary act, or by operation of law. The thief who steals a chattel, or the trespasser who takes it by force, acquires no title by such wrongful taking. The subsequent possession by the thief or the trespasser is a continuing trespass, and if, during its continuance, the wrongdoer enhances the value of the chattel by labor and skill bestowed upon it, as by sawing logs into boards, splitting timber into rails, making leather into shoes, or iron into bars, or into a tool, the manufactured article still belongs to the owner of the original material, and he may retake it

¹ *Buckley v. Buckley*, 12 Nev. 423; *Single v. Schneider*, 24 Wis. 300; *Id.* 30 Wis. 570; *Hungerford v. Redford*, 29 Wis. 345; *Suydam v. Jenkins*, 3 Sandf. 614; *Moody v. Whitney*, 38 Me. 178; *Hyde v. Cookson*, 21 Barb. 103; *Wetherbee v. Green*, 22 Mich. 311; *Herdie v. Young*, 55 Pa. St. 178; *Curtis v. Ward*, 20 Conn. 206; *Baker v. Wheeler*, 8 Wend. 508, and note; *Sedgwick on Measures of Damages*, 501, note 3; *Craig v. Klein*, 65 Pa. 100.

or recover its improved value in an action for damages. And if the wrongdoer sell the chattel to an honest purchaser, having no notice of the fraud by which it was acquired, the purchaser obtains no title from the trespasser, because the trespasser had none to give. The owner of the original material may still retake it in its improved state, or he may recover its improved value. The right to the improved value in damages is a consequence of the continued ownership. It would be absurd to say that the original owner may retake the thing by an action of replevin in its improved state, and yet that he may not, if put to his action of trespass or trover, recover its improved value in damages. Thus far, it is conceded that the common law agrees with the civil. They agree in another respect, to wit, that if the chattel wrongfully taken afterwards come into the hands of an *innocent holder*, who, believing himself to be the owner, converts the chattel into a thing of different species, so that its identity is destroyed, the original owner cannot reclaim it. Such a change is said to be wrought when wheat is made into bread, olives into oil, or grapes into wine. In a case of this kind, the change in the species of the chattel is not an intentional wrong to the original owner. It is therefore regarded as a destruction or consumption of the original materials, and the true owner is not permitted to trace their identity into the manufactured article, for the purpose of appropriating to his own use the labor and skill of the innocent occupant who wrought the change; but he is put to his action for damages as for a thing consumed, and may recover its value as it was when the conversion or consumption took place.

There is great confusion in the books upon the question, What constitutes change of identity? In one case (5 Hen. VII., fol. 15,) it is said that the owner may reclaim the goods so long as they may be known, or, in other words, ascertained by inspection. But this, in many cases, is by no means the best evidence of identity, and the examples put by way of illustration serve rather to disprove than to establish the rule. The court say that if grain be made into malt, it cannot be reclaimed by the owner, because it cannot be known. But if cloth be made into a coat, a tree into squared timber, or iron into a tool, it may. Now, as to the cases of the coat and the timber, they may or may not be capable of identification by the senses merely, and the rule is entirely uncertain in its application, and as to the iron tool, it certainly cannot be identified as made of the original material, without other evidence. This illustration, therefore, contradicts the rule. In another case (Moore's Rep. 20) trees were made into timber, and it was adjudged that the owner of the trees might reclaim the timber "because the greater part of the substance remained." But if this were the true criterion, it would embrace the cases of wheat made into bread, milk into cheese, grain into malt, and others which are put in the books as examples of a change of identity. Other writers say that when the thing is so changed that it cannot be reduced from its new form to its former state, its identity is gone. But this would include many cases in which it has been said by the courts,

that the identity is not gone, as the case of leather made into a garment, logs into timber or boards, cloth into a coat, etc. There is therefore no definite, settled rule on this question, and, although the want of such a rule may create embarrassment in a case in which the owner seeks to reclaim his property from the hands of an honest possessor, it presents no difficulty where he seeks to obtain it from the wrongdoer, provided the common law agrees with the civil in the principle applicable to such a case.

The acknowledged principle of the civil law is that a willful wrongdoer acquires no property in the goods of another, either by the wrongful taking or by any change wrought in them by his labor or skill, however great that change may be. The new product, in its improved state, belongs to the owner of the original materials, provided it be proved to have been made from them; the trespasser loses his labor, and that change which is regarded as a destruction of the goods, or an alteration of their identity in favor of an honest possessor, is not so regarded as between the original owner and a willful violator of his right of property. These principles are to be found in the digest of Justinian (Lib. 10, tit. 4, leg. 12, § 3): "If any one shall make wine with my grapes, oil with my olives, or garments with my wool, *knowing they are not his own*, he shall be compelled by action to produce the said wine, oil, or garments." So in Vinnius' Institutes, tit. 1, pl. 25: "He who knows the material is another's ought to be considered in the same light as if he had made the species in the name of the owner, to whom also he is to be understood to have given his labor."

The same principle is stated by Puffendorf in his Law of Nature and of Nations (Book 4, chap. 7. § 10), and in Wood's Institutes of Civil Law, p. 92, which are cited at large in the opinion of Jewett, J., delivered in this case in the supreme court (4 Denio, 338), and which it is unnecessary here to repeat. In Brown's Civil and Admiralty Law, p. 240, the writer states the civil law to be that the original owner of anything improved by the act of another retained his ownership in the thing so improved, unless it was changed into a different species, as, if his grapes were made into wine, the wine belonged to the maker, who was only obliged to pay the owner for the value of his grapes. The species, however, must be incapable of being restored to its ancient form, *and the materials must have been taken in ignorance of their being the property of another*. But it was thought in the court below that this doctrine had never been adopted into the common law, either in England or here, and the distinction between a willful and an involuntary wrongdoer hereinbefore mentioned, was rejected not only on that ground, but also because the rule was supposed to be too harsh and rigorous against the wrongdoer. It is true that no case has been found in the English books in which that distinction has been expressly recognized, but it is equally true that in no case until the present has it been repudiated or denied. The common law on this subject was evidently borrowed from the Roman at an early day, and at a period when the common law furnished no rule whatever in

a case of this kind. Bracton, in his treatise compiled in the reign of Henry III., adopted a portion of Justinian's Institutes on this subject without noticing the distinction; and Blackstone, in his commentaries. Vol. 2, p. 404, in stating what the Roman law was, follows Bracton, but neither of these writers intimates that on the point in question there is any difference between the civil and the common law. The authorities referred to by Blackstone in support of his text are three only. The first in Brooks' Abridgment, tit. Property, 23, is the case from the Year Book 5, H. 7, fol. 15 (translated in a note to 4 Denio, 335), in which the owner of leather brought trespass for taking slippers and boots, and the defendant pleaded that he was the owner of the leather and bailed it to J. S., who gave it to the plaintiff, who manufactured it into slippers and boots, and the defendant took them, as he lawfully might. The plea was held good, and the title of the owner of the leather unchanged. The second reference is to a case in Sir Francis Moore's Reports, p. 20, in which the action was trespass for taking timber, and the defendant justified on the ground that A entered on his land and cut down trees and made timber thereof, and carried it to the place where the trespass was alleged to have been committed, and afterwards gave it to the plaintiff, and that the defendant therefore took the timber as he lawfully might. In these cases the chattels had passed from the hands of the original trespasser into the hands of a third person. In both it was *held* that the title of the original owner was unchanged, and that he had a right to the property in its improved state against the third person in possession. They are in conformity with the rule of the civil law, and certainly fail to prove any difference between the civil and the common law on the point in question. The third case cited is from Popham's Reports, p. 38, and was a case of confusion of goods. The plaintiff voluntarily mixed his own hay with the hay of the defendant, who carried the whole away, for which he was sued in trespass, and it was adjudged that the whole should go to the defendant; and Blackstone refers to this case in support of his text, that "our law to guard against fraud gives the entire property, "without any account, to him whose original dominion is invaded and "endeavored to be rendered uncertain without his own consent." The civil law in such a case would have required him who retained the whole of the mingled goods to account to the other for his share (Just. Inst. lib. 2, tit. 1, § 28), and the common law in this particular appears to be more rigorous than the civil—and there is no good reason why it should be less so in a case like that now in hand, where the necessity of guarding against fraud is even greater than in the case of a mingling of goods, because the cases are likely to be of more frequent occurrence. Even this liability to account to him whose conduct is fraudulent seems by the civil law to be limited to cases in which the goods are of such a nature that they may be divided into shares or portions, according to the original rights of the parties, for by that law, if A obtain by fraud the parchment of B, and write upon it a poem, or wrongfully take his tablet and paint thereon a picture, B is entitled to the written parchment and

to the painted tablet, without accounting for the value of the writing or of the picture (Just. Inst. lib. 2, tit. 1, §§ 23, 24.)

Neither Bracton nor Blackstone have pointed out any difference, except in the case of confusion of goods, between the common law and the Roman, from which, on this subject, our law has mainly derived its principles. So long as property wrongfully taken retains its original form and substance, or may be reduced to its original materials, it belongs, according to the admitted principles of the common law, to the original owner, without reference to the degree of improvement or the additional value given to it by the labor of the wrongdoer. Nay, more, this rule holds good against an innocent purchaser from the wrongdoer, although its value be increased an hundred-fold by the labor of the purchaser. This is a necessary consequence of the continuance of the original ownership. There is no satisfactory reason why the wrongful conversion of the original materials into an article of a different name or a different species should work a transfer of the title from the true owner to the trespasser, provided the real identity of the thing can be traced by evidence. The difficulty of proving the identity is not a good reason. It relates merely to the convenience of the remedy, and not at all to the right. There is no more difficulty or uncertainty in proving that the whisky in question was made of Wood's corn than there would have been in proving that the plaintiff had made a cup of his gold, or a tool of his iron; and yet, in those instances, according to the English cases, the proof would have been unobjectionable. In all cases where the new product cannot be identified by mere inspection, the original material must be traced by the testimony of witnesses from hand to hand through the process of transformation.

Again, the court below seems to have rejected the rule of the civil law applicable to this case, and to have adopted a principle not heretofore known to the common law, and for the reason that the rule of the civil law was too rigorous upon the wrongdoer in depriving him of the benefit of his labor bestowed upon the goods wrongfully taken. But we think the civil law in this respect is in conformity not only with plain principles of morality, but supported by cogent reasons of public policy, while the rule adopted by the court below leads to the absurdity of treating the willful trespasser with greater kindness and mercy than it shows to the innocent possessor of another man's goods. A single example may suffice to prove this to be so. A trespasser takes a quantity of iron ore belonging to another and converts it into iron, thus changing the species and identity of the article. The owner of the ore may recover its value, in trover or trespass, but not the value of the iron, because, under the rule of the court below, it would be unjust and rigorous to deprive the trespasser of the value of his labor in the transmutation. But if the same trespasser steals the iron and sells it to an innocent purchaser, who works it into cutlery, the owner of the iron may recover of the purchaser the value of the cutlery, because by this process the original material is not destroyed, but remains and may be reduced to its

former state; and, according to the rule adopted by the court below as to the change of identity, the original ownership remains. Thus the innocent purchaser is deprived of the value of his labor, while the guilty trespasser is not. The rule adopted by the court below seems, therefore, to be objectionable, because it operates unequally and unjustly. It not only divests the true owner of his title, without his consent, but it obliterates the distinction maintained by the civil law, and, as we think, by the common law, between the guilty and the innocent, and abolishes a salutary check against violence and fraud upon the rights of property.

We think, moreover, that the law on this subject has been settled by judicial decisions in this country. In *Betts v. Lee* (5 John. 349) it was decided that, as against a trespasser, the original owner of the property may seize it in its new shape, whatever alteration of form it may have undergone, if he can prove the identity of the original materials. That was a case in which the defendant had cut down the plaintiff's trees, and made them into shingles. The property could neither be identified by inspection nor restored to its original form, but the plaintiff recovered the value of the shingles. So in *Curtis v. Groat* (6 John. 169), a trespasser cut wood on another's land, and converted it into charcoal. It was held that the charcoal still belonged to the owner of the wood. Here was a change of the wood into an article of different kind and species. No part of the substance of the wood remained in its original state. Its identity could not be ascertained by the senses, nor could it be restored to what it originally was. That case distinctly recognizes the principle that a willful trespasser cannot acquire a title to property merely by changing it from one species to another. And the late Chancellor Kent in his *Commentaries* (Vol. 2, p. 363), declares that the English law will not allow one man to gain a title to the property of another upon the principle of accession if he took the other's property willfully as a trespasser, and that it was settled as early as the time of the year books that whatever alteration of form any property had undergone, the owner might seize it in its new shape if he could prove the identity of the original materials. The same rule has been adopted in Pennsylvania (*Snyder v. Vaux*, 2 Rawle, 427), and in Maine and Massachusetts it has been applied to a willful intermixture of goods (*Ryder v. Hathaway*, 21 Pick. 304-5; *Wingate v. Smith*, 7 Shep. 287; *Willard v. Rice*, 11 Metc. 493).

We are therefore of opinion that if the plaintiff below, in converting the corn into whisky, knew that it belonged to Wood, and that they were thus using it in violation of his rights, they acquired no title to the manufactured article, which, although changed from the original material into another of different nature, yet, being the actual product of corn, still belonged to Wood.

§ 910. If the original owner recover the value of his property at the time it was taken, with interest, costs, and expenses, it will in most cases be a proper and correct measure of damages. Where a recovery of the value of property

is sought in replevin, the usual measure of recovery is the value before the property was improved by defendant's labor and skill, and this, even where it was taken knowingly and willfully, without color or claim of right, except where such taking was accompanied by special circumstances (as of malice or insult), which would justify exemplary damages, and this is to be estimated by the best means available.¹

§ 911. **Pleadings may be amended to show change in value pending the litigation**, and where the property has increased in value pending the litigation, the court will permit the pleadings to be amended to show this increased valuation, and a recovery may be had accordingly.²

§ 912. **Where the value of the property has been increased by a willful wrongdoer.** The general rule in reference to property wrongfully taken, the value of which has been increased by the wrongdoer, is that he can reap no advantage from it, but that the plaintiff may recover the property or its value in its improved and more valuable condition.³ But this is a harsh rule, and one which will not bear the test of extreme cases. For instance, if a trespasser wrongfully and willfully take a pound of steel from plaintiff, and manufacture it into hair springs for watches, the steel, which was almost worthless, is now worth \$140,000. More than ninety-nine per cent. of this value is labor of the trespasser. We can hardly reconcile it with our feelings of justice that the owner of the material should have all of this increased value, or that he should have the watch springs. The court in *Silisbury v. McCoon*, 4 Denio, 336, says in reference to just

¹ *Single v. Schneider*, 30 Wis. 570. Here defendant willfully cut logs and converted them into lumber. The question was whether plaintiff should have the value as lumber or the value of the logs as shown by the stumpage.

² *Deck v. Smith*, 12 Neb. 389 (10 N. W. 705).

³ *Tuck v. Moses*, 58 Me. 461; *Mann v. Grove*, 4 Hask. (Tenn.) 403; *Holmes v. Goodwin*, 69 N. C. 467; *Weymouth v. Railroad Co.*, 17 Wis. 550; *Southerland on Damages*, 553-555.

such a case: "The trespasser should not be hanged, nor should he lose the whole of the new product. Either punishment would be too great, and it would be more than a "just measure of redress to allow the owner of the original "material to have the whole." On principle, it is difficult to see what right plaintiff has to any of this enhanced value, or to any damages more than full compensation for loss of property and all damages occasioned by the wrongful taking. When the courts attempt to go further, they are using their powers to commit grand larceny on the defendant because he attempted to commit petit larceny on the plaintiff, which is not to be commended, to say the least. Or to illustrate further, suppose a trespasser cut trees and ship them to a foreign market, where they are very valuable; another trespasser cut trees equal in size and value from the same land, and deliver them to a near market. Although the value of the standing timber was the same, the magnitude of the trespass the same, and the actual injury to the plaintiff the same in each case, on this basis of recovery the verdict would be very different in the two cases. And the one who had spent the most time and money subsequent to the trespass would be punished most under no pretense of compensating the plaintiff.

§ 913. Where the defeated party acted in good faith, he is entitled to the increase of value from his labor, provided, of course, that the plaintiff first be fully compensated for his property at the time it was taken and any loss consequent upon the taking. But where the party against whom the judgment is rendered acted *bona fide* in taking and detaining the property, and the labor and expense bestowed upon it was also in good faith, it has been *held* proper to assess damages at its value at the time it was taken, and not to include in the valuation its increased value. Thus, where the action was brought to recover lumber which was manufactured by the defendant from logs cut on the plaintiff's land by mistake, it was *held* that the measure of damages

was the value of the property as improved, less the increase of value from the defendant's labor,¹ and this, I think, is the better rule in all cases.

§ 914. **Depreciation in value is a proper element of damages**, especially where the taker is held to be a wrongdoer *ab initio*, and usually the wrongful taker is liable in damages for any depreciation in his hands, and this rule applies alike to both parties.² Of course, the party cannot recover the depreciation and also the value of the use.³ As elements of damage, the jury may consider the decrease in the value of the property from the time of the replevin, with interest on its entire value.⁴ Where returned, the damages are to be the compensation for the interruption of his possession, the loss of the use of the goods from the time of the replevin till their restoration, and their deterioration in the intervening time.⁵ Under a general allegation of damages the plaintiff may prove any depreciation in the value of the goods while they were in the defendant's hands, from any naturally expected cause.⁶

§ 915. **Under a wrongful taking the defendant is liable for the depreciation** in value of a stock of goods by lapse of time.⁷ In an action of replevin to recover the possession of specific personal property, or the value thereof, in case a return cannot be had, and for damages, the plaintiff may recover damages arising from the depreciation of the goods

¹ *Single v. Schneider*, 30 Wis. 570; *Hungerford v. Redford*, 29 Wis. 345; *Herdic v. Young*, 55 Pa. St. 176. As to mixture of grain, see *Samson v. Rose*, 65 N. Y. 411; *Field on Damages*, 664; *Sedg. on Damages*, II. 431.

² *Rowley v. Gibbs*, 14 Johns. 385; *Hooker v. Hammil*, 7 Neb. 231; *Frey v. Drahos*, 7 Neb. 194; *Moore v. Kepner*, 7 Neb. 291; *Brizsee v. Maybee*, 21 Wend. 146; *Young v. Willett*, 8 Bosw. (N. Y.) 486; *Gordon v. Jenney*, 16 Mass. 465; *Mayberry v. Cliffe*, 7 Cold. (Tenn.) 117.

³ *Odell v. Hole*, 25 Ill. 204.

⁴ *Hooker v. Hammil*, 7 Neb. 231.

⁵ *Washington Ice Co. v. Webster*, 62 Me. 341.

⁶ *Young v. Willett*, 8 Bosw. (N. Y.) 486.

⁷ *Young v. Willett*, 8 Bosw. (N. Y.) 486.

during the wrongful detention by the defendant.¹ Where the plaintiff owns the property in question, and judgment is rendered in his favor, it is proper to allow him as damages the decrease in the market value of the property during the time that the defendant wrongfully detained it.² Where the sheriff held goods for two months, it is proper to show the depreciation in value on account of having to carry the goods over to another season.³

§ 916. **Where the holder neglects the property, he is responsible for the loss in value.** But where the proof showed that the property, while held by defendant, by his use and neglect had depreciated so as to be nearly valueless, *held*, that it was proper to allow plaintiff as damages the difference between the value of the machine as material and the cost of a new machine.⁴ If judgment be in favor of defendant, he is entitled to the property, and any decrease in value between the time of its taking and the trial. If the property cannot be returned, he is entitled to the value at the time of the taking, with interest.⁵ In detinue the jury may assess the value of the property taken at any time between the wrongful taking and the trial. The damages for the detention include any deterioration in the value of the property occasioned by the fault of the wrongdoer, through neglect, abuse, or non-use, during the time of its detention.⁶

§ 917. **Where property was injured in the hands of a wrongful taker, the expenses of doctoring and care are**

¹ *Young v. Willett*, 8 Bosw. (N. Y.) 486.

² *Russell v. Smith*, 14 Kan. 366. See also *Young v. Willett*, 8 Bosw. 486; *Rowley v. Gibbs*, 14 Johns. 385; *Allen v. Fox*, 51 N. Y. 565; *Beveridge v. Welch*, 7 Wis. 465; *Gordon v. Jenney*, 16 Mass. 470.

³ *Carson v. Golden*, 36 Kan. 705 (14 P. 166).

⁴ *Scattergood v. Wood*, 14 Hun. (N. Y.) 269.

⁵ *Severance v. Melick*, 15 Neb. 610 (19 N. W. 596).

⁶ *Wortham v. Gurley*, 75 Ala. 356; *Johnson v. Marshall*, 34 Ala. 522; *Holly v. Flournoy*, 54 Ala. 99; *Freer v. Cowles*, 44 Ala. 314; *Allen v. Fox*, 51 N. Y. 562; *Zitzke v. Goldberg*, 38 Wis. 216; 2 Sedgw. on Damages (7th Ed.), 424, note A; 3 Southerland on Damages, 541-7.

properly allowable as damages. In replevin for a horse, the plaintiff may recover as damages not only the value of the use of the animal during the time it was unjustly detained but also, in case it was injured while so detained, by defendant's neglect, his expenses in taking care of and doctoring it in excess of what those expenses would have been but for the injury, and for loss of service after regaining possession, and the permanent depreciation in value of the horse resulting from such injury.¹

§ 918. **Deterioration in value in hands of defendant—Expenses incurred in searching for property by plaintiff.** The plaintiff is entitled to damages for the time necessarily spent, and expenses incurred in hunting for his property. He is also entitled to compensation for any deterioration in the value of his property while in the hands of the defendant.²

§ 919. **Loss from interruption of business and machinery lying idle.** Where a cloth-printing manufactory, with all its machinery, was seized, it was *held* that the defendants were entitled to an amount of damage sufficient to put their mill-machinery back in running order, as it was when taken; also, compensation for the general inconvenience and loss resulting from the interruption of their possession, and for the expense, trouble, and delay of restoring the factory to its former condition, as well as interest on the value of the property.³

§ 920. **Expenses, counsel fees, etc.** Time spent in getting the writ, attending court, or in endeavoring to recover the property, is not ordinarily an element of damages.⁴ Coun-

¹ Zitske v. Goldberg, 38 Wis. 217.

² Mitchell v. Burch, 36 Ind. 529; Bennett v. Lockwood, 20 Wend. 224; Gordon v. Jenney, 16 Mass. 470.

³ Stevens v. Tuite, 104 Mass. 328; Fuller v. Shattuck, 13 Gray, 70; Homer v. Fish, 1 Pick. 439; Warner v. Comings, 6 Cush. 103; Bennett v. Hood, 1 Allen, 47.

⁴ Blackwell v. Acton, 38 Ind. 426.

sel fees are not ordinarily allowable as part of the damage,¹ but the ordinary costs of the suit are a part of the damage. In Connecticut it has been *held* that, where the injury was wantonly inflicted, the damages in favor of the successful party may be enlarged beyond the ordinary rule.² The costs of teams employed to remove the goods, but not used because of the replevy, are an element of damage.³ In some instances the jury has been allowed a discretion in considering the expenses incurred by either party outside of the ordinary expenses, and to apportion the expenses.⁴ In a leading case on this subject a federal judge instructed the jury that, in cases where the taking was willful, the expenses which the party had been put to, to assert his rights, might be considered in making up their estimate of damages.⁵ On principle, there is no good reason why, where the malice is clear, the wrongdoer should not be adjudged to fully compensate the other party, including pay for his time lost in procuring his rights, and necessary attorney's fees. In Ohio it has been *held* that in cases nominally in tort, where no real malice is complained of, counsel fees ought not to be included; but where the act complained of involves the ingredient of malice or insult, the jury, which has the power to punish, has necessarily the right to include counsel fees in their estimate of damages, if they see proper to do so.⁶

¹ *Park v. McDaniels*, 37 Vt. 594; *Earl v. Tupper*, 45 Vt. 287; *Hoodley v. Watson*, 45 Vt. 289; *Pacific Ins. Co. v. Conard*, 1 Baldwin (C. C.), 138; *Mix v. Kepner*, 81 Mo. 93.

² *Linsley v. Bushnell*, 15 Conn. 225; *Ives v. Carter*, 24 Conn. 392; *Beecher v. Derby Bridge Co.*, 24 Conn. 491; *Dibble v. Morris*, 26 Conn. 416; *Platt v. Brown*, 30 Conn. 336; *Welch v. Durand*, 36 Conn. 182.

³ *Washington Ice Co. v. Webster*, 62 Me. 341.

⁴ *Williams v. Ives*, 25 Conn. 568; *Parsons v. Harper*, 16 Gratt. (Va.) 64; *Earl v. Tupper*, 45 Vt. 275; *Hoodley v. Watson*, 45 Vt. 289.

⁵ *Pacific Ins. Co. v. Conard*, 1 Baldwin, 138.

⁶ *Roberts v. Mason*, 10 Ohio St. 277. On this subject see *Strang v. Whitehead*, 12 Wend. 64; *Fairbanks v. Witter*, 18 Wis. 287; *Blackwell v. Acton*, 38 Ind. 425; *Davis v. Crow*, 7 Blackf. 130; *Earl v. Tupper*, 45 Vt. 275; *Hoodley v. Watson*, 45 Vt. 275; *Hatch v. Hart*, 2 Gibbs (Mich.), 289; *Warren v. Cole*, 15 Mich. 269.

The plaintiff may also recover, as in trespass or trover, for any loss of time or expenses incurred in pursuit of the property, and to discover it where it has been stolen or concealed.¹

§ 921. **The same—Illustrations.** In an action for the recovery of specific personal property, it is error to allow the plaintiff, as damages, money expended by him in the pursuit of the property. This might be proper in an action for conversion.² It is improper for the jury in an action of replevin to allow to the defendant an attorney's fee by way of damages, where the proof fails to show any willful wrong, malice, fraud, or oppression on the part of the plaintiff.³ In the absence of malice, etc., the extent of plaintiff's recovery is the value of the property and interest. He cannot recover for time lost by him or attorney's fees.⁴ A party innocently in possession of property cannot be subjected to costs unless demand be made before the bringing of the suit.⁵ If he should answer, pleading property in himself, the case would be different. An officer cannot recover for his time and expenses in defending a replevin suit.⁶ The statute giving a plaintiff, on recovery in replevin, the right to damages for the wrongful detention of the property by defendant, authorizes not only compensation for any deterioration in the value of the goods replevied while in the hands of the defendant, but also plaintiff's time lost and expenses incurred in searching for the same.⁷ And this is the better rule on principle that the successful party shall recover, in addition to the value of

¹ *Rice v. Nickerson*, 9 Allen (Mass.), 478; *Burnett v. Lockwood*, 20 Wend. (N. Y.) 223; *McDonald v. North*, 47 Barb. 530; *Forsyth v. Wells*, 41 Pa. St. 291; *Field on Damages*, 663.

² *Reddington v. Nunan*, 60 Cal. 632; *Kelly v. McKibben*, 54 Cal. 192.

³ *Cowden v. Lockridge*, 60 Miss. 385.

⁴ *Taylor v. Morton*, 61 Miss. 24.

⁵ *Aultman v. Steiman*, 8 Neb. 109. See chapter on "Demand," *ante*.

⁶ *Rickabaugh v. Bada*, 50 Iowa, 56.

⁷ *Brennan v. Shinkle*, 89 Ill. 604. The statute referred to is as follows: "If judgment is given for plaintiff in replevin, he shall recover damages 'for detention while the same was wrongfully detained by the defendant.'" *Revised Statutes 1874*, Ch. 119, Sec. 23, p. 853.

the property, any extra expense he is put to in searching for the property by the willful act of his adversary. Extra time or expenses incurred in attending court should be called to the attention of the court on a taxation of costs.

§ 922. **Money paid a security company to furnish bond cannot be allowed as damage.** The amount paid by plaintiff to a surety company for furnishing the replevin bond is not a proper element of damage; neither is it proper to be taxed with the costs.¹

§ 923. **Expenses of taking and removing the property** are a part of the costs, and should be made to show in the officer's return, and thus become a part of the penalty assessed against the defeated party in the suit.² An offer of a certain price for the use of property is not competent evidence from which to determine the amount of damages arising from its unlawful detention. The expenses of taking and removing the property by the sheriff are not to be included in the damages given for its detention. They constitute part of the costs in the action.³

¹ *Bick v. Reese*, 52 Hun. 125.

² *Young v. Atwood*, 5 Hun. (N. Y.) 234. But see *Davis v. Crow*, 7 Blackf. 131.

³ *Young v. Atwood*, 5 Hun. (N. Y.) 234; *Masterton v. City of Brooklyn*, 7 Hill, 62.

CHAPTER XXXI

DAMAGES CONTINUED.

	Section.		Section.
Punitive, exemplary, or vindictive damages are sometimes allowed	924	The same	940
The rule of damages the same as in trespass	925	Rule followed in different cases where value not stable	941
The terms punitive, exemplary, and vindictive are misleading	926	What is meant by highest market value	942
Exemplary damages must be pleaded and proved, or they will not be upheld	927	Full indemnity the object of all rules of damage	943
Actual malice must be shown	928	The value should be fixed at the place where the property was	944
No general rule can be laid down in such cases	929	The rule in trover is frequently followed	945
The same—Illustrations—In cases of malice	930	Rule where produce is shipped to a distant market	946
The party claiming damage must not be guilty of contributory negligence	931	A willful wrongdoer will not be allowed what his labor has added to the property	947
A wrongdoer cannot be allowed to make a profit out of his wrongful act	932	Value of gold coin, at what time fixed	948
Vindictive damages against an officer seldom given	933	Nominal damages are incident to success	949
Special damages must be specially proved	934	To recover more than nominal damage, actual damage must be alleged and proved	950
Special damages in favor of defendant	935	Nominal damages as affected by demand and interest of the party	951
A voluntary payment of a lien cannot be recovered back	936	Rule where only a part of the property is recovered	952
At what time value should be fixed	937	In contests between a mortgagee and an officer	953
Value should be assessed as of time of trial	938	The same—Illustrations	954
Where the value is fluctuating	939	Mortgagee can only recover the amount of his claim	955

Section.	Section.
Where the taking was with malice 956	An intruder is liable for damages whether the other party owns the property or not 966
An officer's damage is the face of his writs 957	Damages against sheriff or other officer seizing under a writ 967
Measure of damages where defendant held by execution 958	As against a stranger, the special owner is entitled to the full value of the property . 968
Where an officer is wrongfully dispossessed, his damage is the value of his writs and interest 959	Pledge—Bailor and Bailee—Stranger 969
Where the writs are for too much, he can only recover the amount justly due . 960	In contests between the general and special owners . 970
Cannot recover for use or detention in addition to value 961	Special ownership measure of Damages 971
His valuation evidence against him 962	Prospective profits are too remote, and are not an element of damage . . . 972
Where the replevin is tried before the attachment suit, his lien will be protected . . 963	The same—Illustrations . 973
Rule in replevin between different officers 964	Loss of probable profits is sometimes allowed . . 974
As against an intruder, the officer is entitled to the full value of the property . . 965	Rule of damages—Summary . 975
	In conclusion—Author's rule—Postulates 976

§ 924. **Punitive, exemplary, or vindictive damages are sometimes allowed** where the taking or detention was accompanied by acts of malice, fraud, peculiar hardship for the purpose of oppression, or to derive some unlawful advantage, the object being not only to compensate the injured party, but also to deter the wrongdoer from similar acts in the future by taking away any possible advantage he may have derived from his act.¹ From this it will be seen

¹ *Whitfield v. Whitfield*, 40 Miss. 366; *Davenport v. Ledger*, 80 Ill. 574; *Biscoe v. McElween*, 43 Miss. 556; *Jamison v. Moore*, 43 Miss. 598; *Landers v. Ware*, 1 Strob. (S. C.) 15; *Cable v. Dakin*, 20 Wend. 172; *Brizsee v. Maybee*, 21 Wend. 144; *Mitchell v. Burch*, 36 Ind. 535; *McCabe v. Morehead*, 1 W. & S. (Pa.) 516; *Taylor v. Morgan*, 3 Watts (Pa.), 334; *Dorsey v. Manlove*, 14 Cal. 553; *Herdie v. Young*, 55 Pa. St. 176; *Carey v. Bright*, 58 Pa. St. 70; *McBride v. McLaughlin*, 5 Watts (Pa.), 375; *Dorsey v. Gassaway*, 2 H. & J. (Md.) 402; *Bruce v. Learned*, 4 Mass. 614; *Sedg. on Measure of Damages*, 6th Ed., p. 544; *Eggleston on Damages*, 298.

that the current of authority justifies the assessment of punitive or exemplary damages in cases of willful wrong. But it is a rule liable to great abuse, and is only tolerated as a necessity in certain cases. The courts should exercise a most vigilant watch over all cases where such damages are claimed, and should promptly check any attempt to increase them by appeals to the passions or prejudices of the jury. No case in the law calls for the exercise of a cooler judgment or sounder discretion than cases of this character which are admittedly outside of any rule of law governing the amount to be given, and courts will not enlarge the cases in which the rule is applied. An action by the mortgagee of a colt against the purchaser from the mortgagor, to recover the colt or its value, is a simple action in detinue, and is not a case for exemplary damages, even though it is alleged that the defendant's refusal to deliver the colt, and his disposing and concealing of it, were malicious.¹ On the question of damages in replevin, the means by which the goods have been taken or retained will be considered. Exemplary damages in replevin may be given when there has been outrage in taking or vexation or oppression in the detention. If the taking or detention be under an innocent mistake, the measure of damages may be mere compensation. *Prima facie* the value of the property when and where it is replevied is the measure of compensation, but this may be varied by the character of the taking and removal to the place of replevin.² Although the ordinary rule in replevin is to give damages for the value of the goods taken, with interest on the value, yet, under peculiar circumstances of outrage, vexation, or oppression, the jury may go beyond it by giving exemplary damages, as in trespass.³

§ 925. **The rule of damages the same as in trespass.** If the property was taken under circumstances of outrage,

¹ McDonald v. Norton, 72 Iowa, 652 (34 N. W. 458).

² Craig v. Klein, 65 Pa. 399.

³ Landers v. Ware, 1 Stroble (S. C.), 15; Schofield v. Ferrers, 46 Pa. St. 438; McDonald v. Scaife, 11 Pa. St. 381.

oppression, or vexation, exemplary damages may be allowed, the rule being the same in this respect as in trespass.¹ While the damages are ordinarily the interest upon the value of the goods when taken, from the time of the taking to the day of assessing damages, there are exceptions to the rule, as where it appears that the goods were taken tortiously and without a color of right. Where the writ of replevin has obviously been perverted to the purpose of a willful injury with a full consciousness in the party that he has no claim, the jury may perhaps assess smart-money, as they would for a willful trespass.² Where replevin is brought to establish the right of property which has been fraudulently or wrongfully obtained, it serves also the purpose of an action of trespass, in which the jury may find the value of the thing, and also vindictory damages. In an action of replevin for a chattel sold by an agent in excess of his authority, if the purchaser bought in good faith, believing the agent had authority, and the principal promptly repudiated the sale and brought replevin, the property would be unchanged, but the damages to be recovered would be the value of the article and interest.³

§ 926. **The terms punitive, exemplary, and vindictive are misleading,** in that they imply that the law will correct the wrong done by one party by taking from that party and giving to the one he has wronged more than will compensate him for that wrong. Punitive means involving or awarding punishment; exemplary, serving as a warning; vindictive, given to revenge. But by the use of these terms the courts do not mean that their power is to be exerted any further than to fully compensate the wronged party for all loss or damage. If this leave the wrongdoer poorer than

¹ *Single v. Schneider*, 30 Wis. 570; *McDonald v. Scaife*, 11 Pa. St. 381; (51 Am Dec. 556); *Schofield v. Ferrers*, 46 Pa. St. 438; *Mayberry v. Cliffe*, 7 Cold. (Tenn.) 401; *Eggleston on Damages*, 298; *Sedg. on Damages*, II. 435.

² *Brizsee v. Maybee*, 21 Wend. 144.

³ *Rafferty v. Haldron*, 81* Pa. (32 P. F. Smith) 438.

when he committed the illegal act, he cannot be heard to complain, as he has only received a just punishment. If, on the other hand, he still has a profit in the transaction, the courts assume the right to take this from him, and thus to deter him from similar acts in the future. In other words, the law punishes the wrongdoer by refusing to let him keep any of his ill-gotten gains.¹ Although these terms have different meanings as given above, as used by the courts in replevin cases they have the same meaning, or at least no clear distinction can be made between them.² There is no reason why one alone should not be used, except that their use has become so fixed in the law that each can claim its place as a legal term, and cite a court of last resort as sanctioning this claim. But their use is not so well established as to render it safe to use either one without explaining the sense in which it is used.³

§ 927. **Exemplary damages must be pleaded and proved, or they will not be upheld.** Where the damages for a detention of one day are found equal to the value of the property, and there is no proof of such damage, they are excessive and the judgment will be reversed.⁴ Exemplary damages cannot be given in replevin for the detention of a mare for two hours without wantonness or injury.⁵ In replevin plaintiff may recover vindictive damages, but they must be pleaded specially.⁶ In the absence of malice, gross negligence, fraud, or oppression, the damages should be limited to the value of the property at the time of the taking.⁷ In

¹ *Head v. James*, 49 Miss. 236; *Wilson v. Young*, 31 Wis. 576; *Selden v. Cashman*, 20 Cal. 57.

² *Brown v. Allen*, 35 Iowa, 306; *Chiles v. Drake*, 2 Met. (Ky.) 146.

³ *Detroit Daily Post v. McArthur*, 16 Mich. 452.

⁴ *Stevens v. McClure*, 56 Ind. 384.

⁵ *Cummings v. Gann*, 52 Pa. St. 484.

⁶ *Landers v. Ware*, 1 Strob. (S. C.) 15.

⁷ *Woodburn v. Gogdal*, 39 Mo. 222; *Bonsted v. Orvis*, 22 Wis. 522; *Berthold v. Fox*, 13 Minn. 501; *Garrett v. Wood*, 3 Kan. 231; *Gilliss v. Wofford*, 26 Texas, 76.

the absence of malice, speculative damages will not be allowed.¹

§ 928. **Actual malice must be shown** in all cases before the jury are justified in allowing more than compensatory damages. The act must be shown to have been knowingly, purposely, and maliciously done.² And the malicious act must be done by the party to the suit ordinarily, or if by an agent, by the express direction of the principal, or be ratified by him with full knowledge, or vindictive damages cannot be imposed.³ Where there are several defendants, only those are liable for vindictive damages who were parties to the malicious act.⁴ One who acts in willful defiance of another's rights should answer for all the damage occasioned by his act.⁵

§ 929. **No general rule can be laid down in such cases**—much must be left to the sound judgment of the jury, guided by the court. As the amount of damages above compensation must depend upon the peculiar circumstances of each particular case, it has been said that where a trespass is committed under circumstances denoting malice a jury should be liberal, but not wanton.⁶ In such cases, where there is no fixed standard, the jury are the sole judges, and are responsible only for a wise exercise of their judgment.⁷

¹ *Cummings v. Gann*, 52 Pa. St. 484; *Butler v. Mehrling*, 15 Ill. 488; *Powers v. Florence*, 7 La. Ann. 524.

² *Brown v. Allen*, 35 Iowa, 306; *Ousley v. Hardin*, 23 Ill. 403; *Hyatt v. Adams*, 16 Mich. 180; *Seeman v. Feeny*, 19 Minn. 79; *Selden v. Cashman*, 20 Cal. 57.

³ *Hagan v. P. & W. R. R.*, 3 R. I. 88; *Wardrobe v. California Stage Co.*, 7 Cal. 118; *M. R. R. v. Finney*, 10 Wis. 388.

⁴ *Becker v. Dupree*, 75 Ill. 167.

⁵ *Chandler v. Allison*, 10 Mich. 461; *Fultz v. Wycoff*, 25 Ind. 321; *Simmons v. Brown*, 5 R. I. 299; *Heard v. James*, 49 Miss. 226; *Dubois v. Glaub*, 52 Pa. St. 238; *Douty v. Bird*, 60 Pa. St. 48; *Hanover R. R. v. Coyle*, 55 Pa. St. 396.

⁶ *Detroit Daily Post v. McArthur*, 16 Mich. 447.

⁷ *Pacific Ins. Co. v. Conard*, 1 Baldwin (U. S. C. C.), 138; *Strasburger v. Barber*, 38 Md. 103.

§ 930. **The same—Illustrations—In cases of malice.** Where plaintiff's heifer was taken secretly by defendant, he was allowed compensation for loss of time in hunting her.¹ Where defendant unlawfully took plaintiff's hogs with the evident intention of converting them, and the plaintiff showed that he lost two weeks' time of plow, team, and hand, he was allowed pay for the time spent in hunting them, and necessary expenses in addition to compensation for the decrease in value which his hogs had suffered while in the defendant's possession.² Where the defendant took the plaintiff's horse and wagon, and four days' time was spent and other expenses incurred in the pursuit, a verdict for the time and expenses was *held* good.³ Where plaintiff fraudulently sued out a writ of replevin without color of right, and seized the defendant's goods, the jury are warranted in awarding the defendant exemplary damages, the rule being the same as in case of a willful trespass.⁴ Where the plaintiff entrusted fifty head of cattle to defendant to feed for the winter, that he might have them ready to work with in the spring, and the defendant shipped twenty of the best and sold them for beef, *held*, that the plaintiff was entitled to the value at the time of the sale.⁵ In one of the leading cases upon the subject of damages for trespass, the court says: "Add to the "value of the property where the right of action accrued "such damages as shall cover not only every additional loss "which the plaintiff has sustained, but any increase of value "which the wrongdoer has obtained, or has it in his power "to obtain."⁶

¹ Miller v. Garling, 12 How. Pr. (N. Y.) 203. See McDonald v. North, 47 Barb. 530.

² Mitchell v. Burch, 36 Ind. 535.

³ Bennett v. Lockwood, 20 Wend. 223.

⁴ Brizsee v. Maybee, 21 Wend. 144; McCabe v. Morehead, 1 W. & S. (Pa.) 513; Id. 15 American Law Register, 525.

⁵ Otter v. Williams, 21 Ill. 118.

⁶ Suydam v. Jenkins, 3 Sandf. (N. Y.) 624. But a different conclusion was arrived at in the later case of Wilson v. Mathews, 24 Barb. 295, in which the highest price between the conversion and the trial was allowed.

§ 931. **The party claiming damages must not be guilty of contributory negligence,** but must do all in his power to avoid loss. Thus, if a trespasser willfully leave his neighbor's gate open and cattle enter and destroy his crop, the trespasser is liable; but if the owner knew it was open, and failed to shut it, he cannot recover the full measure of his damages,¹ and the same rule is applicable in replevin. Where the defendants took the plaintiff's horse, which was valuable, for use, he was allowed the cost of hiring another, less the cost of keeping his own, while it was unlawfully detained.² Where the plaintiff failed to give proper bond, and to take possession of the property described in the writ, he could not recover damages for any deterioration, or for the detention while it was in the hands of the officer, through his neglect to give the security required by law.³

§ 932. **A wrongdoer cannot be allowed to make a profit out of his wrongful act.** Where a trespasser cut wheat, he was not allowed to deduct the cost of cutting and harvesting it.⁴ Where timber was wrongfully taken and cut into shingles, the owner was allowed to recover the value as shingles.⁵ And where the property has been taken to a distant market, he may recover the value at that market.⁶ On the other hand, if there has been a loss the wrongdoer must make it up.⁷

§ 933. **Vindictive damages against an officer** should not be given unless it is clear that he acted with malice or in an oppressive and arbitrary manner. The motives of the party who procured the writ are not to be imputed to the officer. He only has to answer for his own acts.⁸ The mere fact of

¹ *Loker v. Damon*, 17 Pick. 289.

² *Davis v. Oswell*, 7 Car. & P. 804. See *Chandler v. Allison*, 10 Mich. 461.

³ *Graves v. Sittig*, 5 Wis. 219; *Williams v. Phelps*, 16 Wis. 80.

⁴ *Bull v. Griswold*, 19 Ill. 631.

⁵ *Baker v. Wheeler*, 8 Wend. 506.

⁶ *Nesbitt v. St. Paul*, 21 Minn. 492.

⁷ *Homer v. Hathaway*, 33 Cal. 119; *Douglass v. Kraft*, 9 Cal. 562.

⁸ *Nightingale v. Scannell*, 18 Cal. 315; *Russell v. Smith*, 14 Kan. 374; *Noxon v. Hill*, 2 Allen, 215.

a wrongful seizure will not authorize exemplary damages.¹ Even where the warrant under which he acted is void, and is held to be no justification of the seizure, it may still be offered in evidence to show the good faith of the officer, and to prevent vindictive damages.²

§ 934. **Special damages must be specially proved, and the burden is on the one claiming the special damage to establish, by a preponderance of evidence, that he is entitled to them.**³ When it is sought to recover such damages as are not the usual and natural consequences of the wrongful act complained of, the rule is that they must be specifically set forth, that defendant may have notice, and not be taken by surprise on the trial.⁴

§ 935. **Special damages in favor of defendant.** In general, it may be said that the defendant who succeeds in the replevin suit may recover any special damage he may have sustained by reason of the wrongful taking of the property from him, by virtue of the writ of replevin. Thus, where machinery in actual use was replevied, and the judgment was for the defendant on the merits of the case, and a judgment was entered for the return of the property, it was *held* that the defendant in the replevin suit was not only entitled to the property or its value, but was entitled

¹ *Beveridge v. Welch*, 7 Wis. 465; *Williams v. Ives*, 25 Conn. 573; *Phelps v. Owens*, 11 Cal. 25; *Selden v. Cashman*, 20 Cal. 57; *Brannin v. Johnson*, 19 Me. 361.

² *Dorsey v. Manlove*, 14 Cal. 555.

³ *Burrage v. Melson*, 48 Miss. 237; *Bodley v. Reynolds*, 8 Q. B. 779; *Slack v. Brown*, 13 Wend. 390; *Strang v. Whitehead*, 12 Wend. 64; *Bennett v. Lockwood*, 20 Wend. 223; *Bogert v. Burkhalter*, 2 Barb. 525; *Vanderslice v. Newton*, 4 Comst. (N. Y.) 130; *Smith v. Sherman*, 4 Cush. (Mass.) 408; *Smith v. Sherwood*, 2 Texas, 460; *Schofield v. Ferris*, 46 Pa. St. 438; *Damron v. Roach*, 4 Humph. (Tenn.) 134; *Park v. McDaniel*, 37 Vt. 594; *Stevenson v. Smith*, 28 Cal. 103; *Dewint v. Wiltsie*, 9 Wend. 326; *Fagen v. Davison*, 2 Duer. 153.

⁴ *Tucker v. Parks*, 7 Col. 62 (1 Pac. 427); *Dickinson v. Boyle*, 17 Pick. 78; *Stevenson v. Smith*, 28 Cal. 103; *Brown v. Cummings*, 7 Allen, 507.

to recover interest on the value of the property, compensation for the general inconvenience and loss arising from the interruption of his possession, and compensation for the expense, trouble, and delay in restoring the property to the original condition for practical use.¹

§ 936. **A voluntary payment of a lien cannot be recovered back in replevin.** Where a plaintiff in replevin pays, without request of defendant, a tax on the property in dispute, when there has been no seizure to enforce the collection of the tax, it is a voluntary payment, and he cannot claim the amount paid in reduction of his damages for the wrongful taking. Where the property is in jeopardy, the defendant should take all necessary steps to care for and protect it, notwithstanding he may believe it is to be seized in replevin, up to the seizure, and money expended in this behalf may be assessed as part of defendant's damage.² Where the plaintiff claimed property by replevin, but it was *held* that on account of his *laches* a certain judgment lien was superior to his claim, which lien he paid, he cannot sue the officer who levied under the judgment, and who was the defendant in replevin, for wrongful conversion. His remedy is to sue to get the money back.³

§ 937. **At what time value should be fixed.** In some states the rule is to fix the value at the time of trial, taking into consideration, in the assessment of damage, any rise or depreciation of value since the taking. This rule is liable to lead to complications in its application, and the simpler and better rule would seem to be, where the plaintiff recovers, to find the value at the time of the wrongful taking or at the commencement of the wrongful detention, as the case may be; where the defendant recovers, to assess the dam-

¹ *Stevens v. Tuite*, 104 Mass. 328; *Stevens v. Smith*, 28 Cal. 102; *McDonald v. North*, 47 Barb. 530; *Eggleston on Damages*, 303; *Field on Damages*, 661; *Sedgwick on Damages*, II. 431, 438; *Southerland on Damages*, 561.

² *Washington Ice Company v. Webster*, 68 Me. 449.

³ *Fich v. Hollinger*, 46 Iowa, 216.

ages as of the time when the property was replevied from him. Interest on this value could be allowed as the legal compensation for the wrongful detention, or in cases calling for special damages they could be allowed.¹ It is not claimed that this method would reach a different result or do more exact justice than the other method, but that it is a simpler way of accomplishing the same end. By whatever method damages are assessed, there are cases in which justice will not be done. The proper rule, I think, is to assess the value at the date of the wrongful taking, or, if the possession of the defeated party was rightful in the first instance, then the value at the time his possession became wrongful, which is usually fixed by demand and refusal. Many cases may be cited as upholding this doctrine.² In the absence of any showing of fraud, malice, negligence, or oppression, the measure of damages for an unlawful taking in replevin is the value of the property at the time it was taken, with interest thereon up to the time of the trial.³ The right of a party in replevin depends upon his right to possession at the time of the commencement of the action, and damages can only be given for interference with that possession.⁴ In

¹ *Sherman v. Clark*, 24 Minn. 37.

² *Jacoby v. Laussatt*, 6 S. & R. (Pa.) 300; *Otter v. Williams*, 21 Ill. 118; *Whitfield v. Whitfield*, 40 Miss. 352; *Keaggy v. Hite*, 12 Ill. 99; *Ormsby v. Vermont Copper Company*, 56 N. Y. 623; *Greer v. Powell*, 1 Bush. (Ky.) 489; *Kennedy v. Whitwell*, 4 Pick. 466; *Greenfield Bank v. Leavitt*, 17 Pick. 1; *Parsons v. Martin*, 11 Gray (Mass.), 111; *Pierce v. Benjamin*, 14 Pick. 356; *Robinson v. Barrows*, 48 Me. 186; *Cushing v. Longfellow*, 26 Me. 307; *Ripley v. Davis*, 15 Mich. 75; *Kennedy v. Strong*, 14 Johns. 128; *Spicer v. Waters*, 65 Barb. 227; *Kipp v. Wiles*, 3 Sandf. 585; *Hendricks v. Decker*, 35 Barb. 298; *Lilliard v. Whitaker*, 3 Bibb. (Ky.), 92; *Sproule v. Ford*, 3 Litt. (Ky.) 26; *Davies v. Richardson's Exrs.*, 1 Bay (S. C.), 102; *Shepherd v. Johnson*, 2 East. 211; *Baltimore Insurance Company v. Dalrymple*, 25 Md. 269; *Berthold v. Fox*, 13 Minn. 507; *Garrett v. Wood*, 3 Kan. 231; *Gilson v. Wood*, 20 Ill. 37. A trespass case, value at time of trespass.

³ *Bonested v. Orvis*, 22 Wis. 522; *Garrett v. Wood*, 3 Kan. 231; *Gillies v. Wofford*, 26 Texas, 76; *Woodburn v. Cogdal*, 39 Mo. 222; *Berthold v. Fox*, 13 Minn. 401.

⁴ *Cumberland v. Tilghman*, 13 Md. 74.

England, by statute,¹ interest is allowed on the value at the time of the seizure or conversion, thus impliedly fixing the time at which the value should be fixed.² On this branch of our subject many different rules have been followed by the courts. See review of authorities in note.³

¹ 3 and 4 W. IV., C. 42, § 29.

² *Greenfield Bank v. Leavitt*, 17 Pick. 3; *Yater v. Mullen*, 24 Ind. 277; *Wood v. Braynard*, 9 Pick. 322; *Barnes v. Bartlett*, 15 Pick. 78.

³ The general rule of damages in England and in this country for the wrongful conversion of property is the fair market value of the property at the time of conversion, with interest from that time. *Suydam v. Jenkins*, 3 Sandf. 626, and authorities there cited; *Keaggy v. Hite*, 12 Ill. 99; *Otter v. Williams*, 21 Ill. 118. An exception was made to the general rule in *Shepherd v. Johnson*, 2 East, 211, where the subject matter of the litigation was stocks, and it was supposed, on account of their fluctuating value, full indemnity required that their value should be assessed at their value at time of trial, so that the plaintiff could replace the stocks by the amount of the recovery. The doctrine of this case was recognized in *Gunning v. Williamson*, 1 C. & P. 625, which was an action of trover for cotton warrants, and in *Gainsford v. Carroll*, 2 B. & C. 624; *Downs v. Beck*, 1 Stark. 318; and in *Harrison v. Harrison*, 1 C. & P. 412. These cases were followed in New York in the cases of *West v. Wentworth*, 3 Cow. 82, where the rule was applied when the property was not stocks; and in *Clark v. Pinney*, 7 Cow. 681, and particularly *Markham v. Jandon*, 41 N. Y. 235, and *Romaine v. Allen*, 26 N. Y. 305; and the plaintiff allowed to recover the highest market price of the stocks from the day of conversion to the time of trial.

In *Scott v. Rogers*, 31 N. Y. 676, the court limited the rule to the highest market value between the time of conversion and a reasonable time afterwards for the commencement of the action. The same court, however, in *Markham v. Jandon*, *supra*, affirmed the former rule, but in *Matthews v. Coe*, 49 N. Y. 57, *Church, C. J.*, delivering the opinion of the court, said that he was persuaded that the unqualified rule giving the plaintiff in all cases the highest value to time of trial could not be upheld upon any sound principle of reason or justice, and that the qualification of the rule that the action must be commenced within a reasonable time, and prosecuted with diligence, did not relieve it of its objectionable character; and in the case of *Baker v. Drake*, 53 N. Y. 211, the statement of Chief Justice Church was approved, and the rule of damages in *Markham v. Jandon*, repudiated. Neither of these cases, however, state what the correct rule is, but in *M. & T. Bank v. F. & M. National Bank*, 60 N. Y. 40, all the preceding cases, as we conceive, upon this subject were overruled, and the rule adopted "that in the absence of special circumstances, the value at the time of the conversion, with interest,

"furnishes the rule for compensation." A careful examination of the cases in New York will show that the difficulties attending the enforcement of the rule of the highest market value were so great, and the rule itself so liable to work gross injustice in many cases, that the courts felt compelled to modify in many instances, and finally overthrew it as a rule of law. So in California, in *Douglas v. Kraft*, 9 Cal. 562, which was an action for conversion of certain warrants, the highest price after conversion was declared to be the measure of damages, and in *Homer v. Hathaway*, 33 Cal. 117, the question arose whether the highest price between the conversion and the trial, or the price at the time of the taking, was the rule, and the court says it is not an open question in that state—that the rule was settled in *Douglas v. Kraft*, which they approve. But in *Page v. Fowler*, 39 Cal. 142, the court shrank from the enforcement of the rule. The application of it to the facts of that case made the rule so repugnant to every sense of justice that the court proceeded to qualify it by limiting it to a reasonable time after the taking, substantially following *Scott v. Rogers*, *supra*. The California court in this opinion say that the rule is not supported by a majority of the adjudicated cases, and does not appear to be very well satisfied with the definiteness of the rule announced in *Page v. Fowler*, but consoles itself with the reflection that it is equally so as that of the New York court.

In Illinois the general rule prevails that the market value at the time of the conversion is the measure of damages in trover, and where the property converted was stocks—*Sturges v. Keith*, 57 Ill. 451—the court refused to make any exception in the rule of the assessment of damages on account of the subject matter of the litigation. And we do not think that if our supreme court has refused to recognize the exception to the general rule, and to endorse the reasons upon which such exception is founded in a case where the property converted was stocks, the very property involved, which, on account of its fluctuating value, led the courts to depart from the general rule, it will be likely to change its holding in a case where other property is in controversy. While the courts in some few of the states still adhere to the rule of the highest market value after conversion, we think the great weight of authority is against it, and considering that fact, in connection with *Sturges v. Keith*, *supra*, we are agreed that the rule laid down to the jury in this case by the court below cannot be sustained in this respect. Besides, the instruction is erroneous in directing the jury to allow interest from the date of replevin. If the highest market value is taken, interest should be computed only from the time when such value is estimated.

If the rule for the admeasurement of damages is the same in a suit upon a replevin bond, where the property has not been returned, as it is in trespass or trover, for the wrongful taking or conversion of property, it could be very easily stated, under our present understanding of the law, and that would be, in the absence of any circumstances justifying the allowance of punitive damages, the value of the property at the time it was taken or converted, with interest thereon from that date. We

have been referred to no case in the reports of our own state where the rule has been declared in such a way as to have the force of an adjudication. There are cases where the finding has been for the value of the property, but none where the point of time at which the value should be estimated has by counsel or court been made material.

In examining the decisions in other states where the question has been made, we find that they are not entirely harmonious. In *Washington Ice Company v. Webster*, 62 Me. 361, it was *held* if the goods replevied are not forthcoming on demand, where a return has been ordered, the defendant in a suit upon the bond is entitled to recover as damages the value of the goods when taken, with the interest thereon from the service of the writ to the rendition of the judgment—referring to *Wood v. Brainard*, 9 Pick. 322, and to *Thomas v. Spofford*, 46 Me. 408. But when the goods are not returned at the time of the demand upon the writ, if they shall then be of an increased market value, the defendant is equitably entitled to such increase, in which case the value of the goods replevied, or of goods of like description at the date of the demand on the writ of return, with interest, with the damages at the time of non-suit and costs and interest, will constitute the amount the defendant will be entitled to recover on his bond—referring also to *Tuck v. Moses*, 58 Me. 461.

It was *held* in *Swift v. Barnes*, 16 Pick. 194, in a case where the measure of damages was not affected by statute, that the true measure of damages was the value at the time it should have been restored under the writ of return. The point was directly made in this case, and the rule announced was affirmed by the same court in *Leighton v. Brown*, 98 Mass. 515—a case where the property, at the time when it should have been returned, was of greater value than when replevied. In *Caldwell v. West*, 21 N. J. Law (1 Zab.), 411, in an action on a replevin bond, the court *held* that the value of the goods at the time of recovery, with interest from that date, was the proper rule for damages for non-return of the property. The rule here announced differs from the Massachusetts rule in fixing the date at which the value is to be estimated at the time of the judgment for a return, instead of from the date of demand made for the return of the property upon the writ of return issued upon such judgment. The rule in Missouri is stated in *Miller v. Whitson*, 40 Mo. 97, to be the value of the property when taken, with legal interest thereon to time of trial. This rule was announced in the replevin suit, but it seems the rule in that state is to render an alternative judgment for a return of the property or the payment of the damages, including the value of the property. The Minnesota rule seems to be to estimate the value of the property at or about the time it was replevied. *Berthold v. Fox*, 13 Minn. 501. In Nebraska the jury have the right under the code to assess the damages at what they deem right and proper, and then an alternative judgment is entered. *School District v. Shoemaker*, 5 Neb. 38; *Hooker v. Hammil*, 7 Neb. 231. In Tennessee, by statute, if a verdict be found for the defendant in replevin, the jury are to find the value of the property, and interest and damages for the detention, and

the judgment then is for a return of the property by plaintiff, and, on failure so to do, the defendant recovers its value and the damages assessed for its detention. There appears to be in that state no judicial means provided for compelling a return, it being optional with the plaintiff to return the property, and thereby satisfy the judgment to the extent of the value so found by the jury, or repay the judgment and retain the property. The supreme court of that state, in *Mayberry v. Cliffe*, 7 Cold. 117, in stating the rule which should govern the jury in assessing the value of the property and damages, *held* that the value of the property at the time of the replevin should be taken, and if the property appreciated and remained at a higher market price, at the time of trial, the difference should be allowed as damages for the detention, and if depreciated in value while in plaintiff's custody, not by natural wear and deterioration, such depreciations should be allowed as damages. It was further *held* that under their statute the jury was allowed a large discretion, and if, in their opinion, justice demanded it, they might allow the defendant as damages the loss of near and probable profits arising from a temporary rise in market value.

The supreme court of Wisconsin—not in a suit on a replevin bond, however, but in a case for the recovery of hay, wheat, and oats, and where the trial court had given an instruction like the one in the case at bar—after a review of authorities, *held* the rule of the highest market value to be erroneous, and established the rule “that in all actions, “either upon contract for the non-delivery of goods, or for the tortious “taking or conversion of the same, unless the plaintiff is deprived of “some special use of the property anticipated by the wrongdoer, and in “the absence of proof of circumstances, which would entitle the plaintiff “to recover exemplary or punitive damages, the measure of damages is: “First—The value of the chattels at the time and place when and where “the same should have been delivered, or of the wrongful taking or conversion, with interest on that sum to the date of trial. Second—If it appears that the defendant, in case of a wrongful taking or conversion, “has sold the chattels, the plaintiff may, at his election, recover as his “damages the amount for which the same was sold, with interest from “the time of sale to day of trial. Third—If it appears that the chattels “wrongfully taken and converted are still in the possession of the defendant at the time of trial, the plaintiff may, at his election, recover “the present value of the same at the place where the same were taken “or converted, in the form they were in when so taken or converted.”

The citation of these authorities is sufficient to show that the rule can not be considered as settled, and in the absence of any decision of our court upon the point, we feel at liberty to give our views upon the subject, remembering that the great object of the law is to furnish complete indemnity to the party wronged by the act of another in seizing and retaining his property contrary to right and the judgment of the law.

In an action of replevin, where the defendant asserts title to the property as well as the plaintiff, each party becomes an actor, the plaintiff

seeking to retain the property which he has obtained upon his writ, and to recover damages for the detention, and the defendant seeking a return thereof to himself as owner, together with his damages. In the meantime the property is considered as in the custody of the law, the law having for the time being entrusted its possession to the plaintiff, and accepting his bond as representing the property. The law presumes that the plaintiff will, in compliance with the terms of his bond, return the property to the defendant if the right to it shall be adjudged against him. If the plaintiff succeeds, the judgment of the court confirms him in his title, and awards him damages; and if the defendant recovers, the court awards to him the restoration of the property, and determines that the plaintiff had no right to it, and that he had, by the wrongful use of the process of law, violated the property rights of the defendant, and that for such violation the defendant is entitled to indemnity in the way of damages. From the time of the institution of the suit, the defendant is contesting the plaintiff's right to the property and asserting his own, and when he finally succeeds, he establishes his right to have the identical property restored to him. The value of the property is not in issue. The contest is over the specific article itself. Therefore, under our practice, the value of the property is never included in the assessment of damages, upon the termination of the replevin suit, in favor of defendant. The bond stands in place of the property, and, in contemplation of law, is amply sufficient to compel its return. If not returned in obedience to the order of the court, its value can be recovered in a suit upon the bond. If the property is such that its use and enjoyment would be of pecuniary value to the defendant, he can have his damages assessed under statute by the jury which tried the original suit; and if not paid, or if not assessed in the replevin suit, appropriate breaches can be assigned in the declaration upon the bond, and a recovery had. When the property is of such character that damages are recovered for the use thereof from the time it was replevied until final judgment in the replevin suit, or in a suit upon the bond, the recovery of such statutory damages precludes the plaintiff from the recovery of interest upon the value of the same property during the same period. But where the property is not usable in the sense that its use alone will return a pecuniary profit to its owner, interest upon its value should be allowed as a compensation for the deprivation of the investment in the property. Ordinarily, the measure of damages in trespass and trover applies in replevin, but there are cases where the rule will not furnish full indemnity to a defendant. In trespass or trover the plaintiff, by bringing his action to recover damages for the taking or conversion of his property, instead of seeking to recover the specific property, consents to a transfer of the title to the goods and chattels taken, to a defendant in the suit; and when a recovery is had, the title is considered as having passed to the defendant at the time of the taking or conversion. At that date the right of action accrued which subsequently became merged in the judgment. The rule, therefore, would appear to be a just one, that

the value of the property at the time the title is treated as having passed, with interest, is the proper measure of damages.

But it seems to us that the successful defendant in replevin, considering his position with reference to the object to be attained by the litigation and the character of the judgment rendered in his favor, does not in all cases occupy the position of a plaintiff in trespass or trover. It is true that, by the wrongful taking of his property upon the replevin writ, he is just as effectually deprived of the possession of his property as though the taking was without the process of law, and he may be said to have sustained damages to the same extent; but by defending the replevin suit he is continually asserting his title to the specific article taken from him, and seeking its return. Where a judgment is finally entered in his favor and an order for the restoration of the property, the judgment is conclusive that the property belonged to the defendant at the time of the replevin, and that it was wrongfully taken from him, and the order for the return is equally conclusive that at the date of its entry he was still entitled to it. The order for the return of the property being entered, it becomes the duty of the plaintiff to immediately deliver it into the possession of the defendant, or the defendant can at once demand it, and upon a refusal of the plaintiff to comply with the order of the court, the defendant can maintain his suit upon the bond, If the property be returned, the defendant has the benefit of any increase in value, and we think a wrongdoer should not derive any advantage from the disobedience of an order of court that he would not have retained by complying with it.

We are therefore of the opinion that when the property is of greater value at the date of the order for a return than it was at the time of replevin the defendant should be allowed for such increased value in addition to the value of the property when taken, and the interest thereon. We think the rule that estimates the value at the time of the demand upon the writ of return is open to the same objection as the rule of the highest market value between the time of the replevin and the date of the trial upon the bond. The latter gives the defendant the whole period covered by the statute of limitations in which to commence his action and set his price; the former, the whole time in which he can lawfully issue his writ and make demand, thus allowing him, where the property cannot be returned, to fix its value when the market price is at its highest, which in many cases, if allowed as damages, would be oppression instead of indemnity. We take the date of the recovery at the time when any appreciation in the value of the property is to be considered, as that is the time when the defendant is adjudged to be entitled to the restoration of the property taken with its increased value, and we think that the selection of such date is not open to the same objections or liable to work such injustice as the adoption of a rule that allows the defendant to take advantage of a fluctuation of the market through a long period of time, or to select a price at any intermediate date. For the error

in giving the said instruction, the judgment must be reversed, and the cause remanded.

§ 938. **Value should be assessed as of time of trial.** The value of the property should be assessed at the time of the trial. If the price has fallen in the time it has been detained, the jury should include the difference in price in their assessment of damages for the detention.¹ In replevin, the assessment of the value must be based upon the value at the time of trial. Where there is no evidence of this, and no evidence showing that the property has depreciated since the bringing of the suit, the plaintiff cannot complain that the jury found the value to be that sworn to by him in his affidavit for replevin.² Where the defendant claims the goods replevied and demands a return thereof, and the jury finds in his favor, his damages are the value of the goods at the time of such assessment, and the damages, if any, sustained by defendant in consequence of the taking and detention.³ A defendant in replevin, if successful, is entitled to the value of the property replevied, at the time of the rendition of judgment for a return.⁴ Where the defendant claims the property replevied, and demands a return thereof, and the jury finds in his favor, they should assess the value of the goods at the time of the assessment, and the damages, if any, sustained by defendant in consequence of the taking and detention. If they have depreciated in value in plaintiff's hands, they should consider this fact in assessing the damage.⁵

¹ *Boylston v. Davis*, 70 N. C. 485; *Holmes v. Godwin*, 69 N. C. 467; *Scott v. Elliott*, 63 N. C. 215; *Rowley v. Gibbs*, 14 John. 385.

² *Schultz v. Hickman*, 27 Mo. App. 21.

³ *Burkeholder v. Rudrow*, 19 Mo. App. 60; *Chapman v. Kerr*, 80 Mo. 158; *Mix v. Kepner*, 81 Mo. 93; *Pope v. Jenkins*, 30 Mo. 528; *White v. Storms*, 21 Mo. App. 288; *Hoester v. Teppe*, 27 Mo. App. 207.

⁴ *Tuck v. Moses*, 58 Me. 361. This was a suit on the bond for failure to return wood as ordered by trial court, and it was shown that the wood had increased in value since the unlawful taking under the writ.

⁵ *Chapman v. Kerr*, 80 Mo. 158; *Pope v. Jenkins*, 30 Mo. 528. The first case overrules in express terms *Woodburn v. Cogdal*, 39 Mo. 228,

§ 939. **Where the value is fluctuating.** Where the value of the property is stable, the rule of taking the value at the time of conversion will come nearer doing justice than any other rule; but where the value is unstable—constantly changing—it is more difficult to formulate a rule that shall do justice in all cases, and the courts have followed different rules in endeavoring to do justice in each case. But upon a consideration of all the cases, it would seem to be the better plan to adhere to the rule heretofore given, and if the circumstances are such that it does not make full compensation to the wronged party, let the jury give such additional compensation as in the exercise of their best judgment is proper. Such discretion properly belongs to the jury in replevin.¹ But none of these rules can be said to be generally recognized, and their soundness and general application have been frequently denied or questioned. In speaking of the rule in *Markham v. Jaudan*, *supra*, the leading case in favor of allowing as damages the highest value between the conversion and trial, the court in *Baker v. Drake* say: “This rule has been recognized in several cases where the value of the property was fluctuating, but its soundness, as a general rule, has been seriously questioned.”² “An unqualified rule, giving the plaintiff the highest price between the conversion and the time of trial, cannot be upheld on any principle of reason or justice.”³ Where the property is not taken, the value at the time of the trial should be found, and not the value at the time of the demand.⁴

§ 940. **The same.** The courts have attempted to qualify

and *Miller v. Whitson*, 40 Mo. 101, both of which lay down the rule that the value of the property at the time taken is the measure of damages. *Richey v. Burnes*, 83 Mo. 362.

¹ *Jones v. Allen*, 1 Head. (Tenn.) 626.

² *Baker v. Drake*, 66 N. Y. 518.

³ *Matthews v. Coe*, 49 N. Y. 57. See *Morgan v. Jaudon*, 40 How. Pr. 366; *Stewart v. Drake*, 46 N. Y. 449.

⁴ *Button v. Chapin*, 7 N. Y. Civ. Prac. R. 278.

this rule by saying that suit must be brought within a reasonable time, and its trial urged with diligence. It is a rule of doubtful justice to give the plaintiff the whole period of the statute of limitations within which to select his standard of value.¹ But even with this qualification, it is an unsatisfactory rule. In referring to it, the supreme court of California say: "If a quantity of fruit—strawberries, for instance—be taken in the season of the greatest plenty, under circumstances which entitle the owner to indemnity only, and suit began at once to recover the value, trial, in the ordinary course of events, could not take place for many months. In the meantime, the season of plenty has passed, and the price has risen enormously, and under the rule allowing the highest prices the plaintiff could recover the enhanced value, which he could by no possibility have realized himself."² This was a case where hay was replevied in 1863, when it was worth about \$3 per ton, and defendant claimed the value at a time in 1864, when it was worth about \$40 per ton, and judgment was rendered for the highest value. The supreme court, in setting this judgment aside, lay down the rule that the correct measure of damages is the highest market value within a reasonable time after the taking. *Page v. Fowler* is a leading case on this subject, and will well repay perusal. The rule has been further qualified, by requiring the prevailing party to show that he was the owner, and so entitled to this value, and that he could have held until that time, and would have sold then.³ Where a quantity of wheat, the property of the defendant, had been seized, and on trial ordered to be redelivered to the defendant, and it appeared that wheat at that time was of about the same market value as when taken, but in the meantime had been much higher, it was *held* that defendant was not

¹ *Scott v. Rogers*, 31 N. Y. 678.

² *Page v. Fowler*, 39 Cal. 416.

³ *Bailey v. Shaw*, 4 Foster (N. H.), 301; *Baker v. Drake*, 53 N. Y. 211.

entitled to the benefit of such advance without showing that he would have sold at such time.¹

§ 941. **Rule followed in different cases where value not stable.** It has been *held* that what it would take to replace the goods was the proper measure of damages²—the value at the time it should be restored,³ the highest value after taking and before trial.⁴ It has been *held* in trover that the value could be fixed at any time between demand and judgment.⁵ The highest market price within a reasonable time has been said to be the proper rule.⁶ Though these rules are not universal, they have been followed in many cases.⁷ The fact of so many different rules being given for a guide in this class of cases shows that the courts have not been satisfied with the correctness and justice of those given, and felt it to be a duty to search for a better rule.

§ 942. **The highest market value** embraces changes due to natural and normal causes, and not those that are due to panic or corners, or other unnatural causes. Such prices are seldom of more than momentary duration, and will not be considered by the courts in fixing the market value, and unusual depression from the same causes would not be regarded as fixing the market.⁸ “The highest market value”

¹ Meshke v. Van Doren, 16 Wis. 319.

² Starky v. Kelly, 50 N. Y. 676.

³ Swift v. Barnes, 16 Pick. 196.

⁴ Cortelyou v. Lansing, 2 Cain's Cases, 200; Burt v. Dutcher, 34 N. Y. 493; Romain v. Van Allen, 26 N. Y. 309; Wilson v. Mathews, 24 Barb. 295; Markham v. Jaudon, 41 N. Y. (Hand.) 239; Morgan v. Grigg, 46 Barb. 183; Barnett v. Thompson, 37 Ga. 335.

⁵ Johnson v. Marshall, 34 Ala. 528; Williams v. Archer, 5 M. G. & S. 318.

⁶ Scott v. Rogers, 31 N. Y. 678; Cannon v. Folsom, 2 Iowa, 101; Pinkerton v. R. R. Co., 42 N. H. 424; Page v. Fowler, 39 Cal. 412.

⁷ Hamer v. Hathaway, 33 Cal. 119; Douglass v. Kraft, 9 Cal. 563; West v. Wentworth, 3 Cow. 82; Kortwright v. Com. Bank, 20 Wend. 91; Com. Bank v. Kortwright, 22 Wend. 348; Wilson v. Matthews, 24 Barb. 295; Willard v. Bridge, 4 Barb. 361; Allen v. Dykers, 3 Hill, 593; Lobdell v. Stowell, 51 N. Y. 77; Blot v. Boiceau, 3 Comst. 85.

⁸ Mayberry v. Cliffe, 7 Cold. (Tenn.) 124.

to be fixed by the general range of the markets for the period of time included, and not by a sudden inflation or depression from unnatural causes.¹

§ 943. **Full indemnity the object of all rules of damage.** Whatever may be the form of action in which reparation is sought, the sum due for compensation must be the same in trespass, trover and replevin. There can be no variance in the amount of an indemnity, and if its criterion can be fixed, any departure from the standard which it establishes must be capricious and arbitrary, and must involve more or less of injustice to one or other of the parties to the injury. The general rule both in England and this country is that *the current or market-value of the property at the time of the conversion, with interest from that time until the trial*, is the measure of damages. There are, however, several exceptions to this rule, one of which is when force or fraud have been resorted to, where vindictive damages may be given.²

§ 944. **The value should be fixed at the place where the property was at the time of the unlawful taking.** From the time of the taking every act is an infringement of the rights of the other party, and the usual order is that it be returned to the place where taken. If it is not returned, its value at the place from which it was wrongfully removed is the only proper measure of damages. The cost of manufac-

¹ Smith v. Griffiths, 3 Hill, 333; Durst v. Burton, 47 N. Y. 175.

² Suydam v. Jenkins, 3 Sand. (N. Y.) 621. This case is very long, and discusses the subject fully. Amery v. Delamere, 1 Strange, 505; Fisher v. Prince, 3 Burr, 136; Finch v. Blount, 7 Car. & P. 478; Cooke v. Hartle, 8 Car. & P. 568; Mercer v. Jones, 3 Camp. 476; Shotwell v. Wendover, 1 J. R. 65; Wilson v. Conine, 2 J. R. 280; Kennedy v. Strong, 14 J. R. 128; Hallett v. Novion, 14 J. R. 273; Dillenbach v. Jerome, 7 Cow. 294; Baker v. Wheeler, 8 Wend. 505; Watt v. Potter, 2 Mason, 76; Kennedy v. Whitmore, 4 Pick. 466; Sargent v. Franklin, 8 Pick. 90; Johnson v. Sumner, 1 Met. 172; Barry v. Bennett, 7 Met. 354; White v. Webb, 15 Conn. 502; Jacobs v. Laussatz, 6 S. & R. 350; Lillard v. Whitaker, 3 Bibb, 92; Sproule v. Ford, 3 Litt. 25.

turing an article and transporting it to market may properly be inquired into, to ascertain the value of the article at the time and place of its taking.¹ Where the property when taken or demanded is near a market for such property, the market value at that time and place is the proper measure of value.² But where it is far from market when taken, the price at the nearest market, less the cost of transporting it to that market, would probably be the proper measure of value. But this question is not solved without difficulty, especially where the property has been moved by the wrongdoer to a great distance or another market. Thus, where hay was taken from Alameda County and shipped to San Francisco, where it was worth much more than where taken, with cost of transportation added, and plaintiff claimed the highest price at San Francisco, the court decided that the market value at the place where taken was the proper rule of value.³ In trespass for timber cut and removed, the court said the plaintiff might have recovered his logs by replevin had he chosen to follow them, but as he had sued in trespass, the proper measure of value was the value where the trespass was done.⁴ And a similar rule was followed in case of coal mined in the mine of another.⁵ And in trover for steel ingots for which there was no market at that time, the court admitted evidence of the value of steel made from these ingots, and how much it would cost to convert these ingots into something for which there was a market.⁶

§ 945. The rule in trover is frequently followed; and generally "in those states where the value in trover may be "estimated at the highest price of the property between the "conversion and the commencement of the suit or the trial, "the highest value may also, under like circumstances, be

¹ *Brizsee v. Maybee*, 21 Wend. (N. Y.) 144.

² *Fort v. Saunders*, 5 Hiesk (Tenn.), 487.

³ *Hamer v. Hathaway*, 33 Cal. 120.

⁴ *Cushing v. Longfellow*, 26 Me. 306.

⁵ *Martin v. Porter*, 5 M. & W. 353.

⁶ *Meeker v. Chicago Cast Steel Company*, 84 Ill. 277.

"recovered in replevin by the plaintiff as damages, in case he "succeeds in establishing his right to the property and fails to "recover the same *in specie*."¹ In detinue, as in trover, the jury may assess the highest value of the property at any time between the commencement of the suit and the trial, but they are not bound to do so.²

§ 946. **Rule where produce is shipped to a distant market.** Where produce was taken and shipped to a distant market and sold by defendant, and plaintiff claimed the gross product of the sale, while the defendant claimed that a deduction should be made for the expenses of transportation to the city market, the court said: "If plaintiff complains "of the detention of the property, if it is delivered on demand his claim is satisfied, except damages for detention. "If it cannot be delivered, then the value at the place where "the delivery should have been made is the proper value of "the property." Neither the price at the distant market, nor that price less the freight and commissions, is the true criterion of value at the place of the alleged detention; but proof of value at the distant market, and the cost of transportation there, is admissible to assist the jury in fixing the value at the place of detention.³ Where cattle, in litigation, had died as alleged by the wrongful act of defendant, and at the place where they died there was no market for them, and no market within 200 miles, the court allowed evidence of the value at the natural market though quite distant, as the price there would be some guide to the value

¹ Tully v. Harloe, 35 Cal. 302; Suydam v. Jenkins, 3 Sandf. (N. Y.) 614; Hamer v. Hathaway, 33 Cal. 117; Romain v. Van Allen, 26 N. Y. 309; Lobdell v. Stowell, 51 N. Y. 70; Bank v. Reese, 26 Pa. St. 143; Musgrove v. Beckendorff, 53 Pa. St. 143; Nieler v. Kelly, 69 Pa. St. 403; Paige v. Fowler, 39 Cal. 412; Ellis v. Wire, 33 Ind. 127; Ewing v. Blount, 20 Ala. 694; Johnson v. Marshall, 34 Ala. 522; Freeman v. Harwood, 49 Me. 195; Field on Damages, §§ 246, 828.

² Holly v. Flournoy, 54 Ala. 99.

³ Hisler v. Carr, 34 Cal. 645; Cushing v. Longfellow, 26 Me. 310; Swift v. Barnes, 16 Pick. 196.

where they died.¹ Such testimony is not admitted as fixing the value, but as the best testimony which under the circumstances can be had, and as forming some guide to the value, much is left in such cases to the good judgment of the jury.²

§ 947. **A willful wrongdoer will not be allowed what his labor has added to the property.** In actions of replevin damages are determined upon the same principles as in trespass. They may be punitive or remunerative simply, according to the presence or absence of malice or wantonness in the taking. If the act was in good faith, upon some supposed right or claim or error, the measure will be the value of the property at the time it was taken; but if the taking be characterized by malice or oppression, damages may be punitive, and in an action for its recovery no allowance will be made the defendant for any increased value that may be bestowed by his skill and labor upon the property.³

§ 948. **Value of gold coin at what time fixed.** A person who had deposited gold coin with a bank, to be returned in like coin, brought an action to recover possession of it. *Held*, that a judgment for a return of the gold, or, in default thereof, for its par value with interest from the time of demand, was correct, although gold was worth a premium in legal tender notes.⁴ Coin may sometimes be treated as merchandise and its value estimated in ordinary currency, and in such

¹ *Sellar v. Clelland*, 2 Col. 532.

² *Savercool v. Farwell*, 17 Mich. 308; *Gregory v. McDowell*, 8 Wend. 435; *Dubois v. Glaub*, 52 Pa. St. 238; *Durst v. Burton*, 47 N. Y. 175; *Wemple v. Stewart*, 22 Barb. 154; *Smith v. Griffith*, 3 Hill, 333; *Doak v. The Exr. of Suapp*, 1 Cold. (Tenn.) 181; *Dana v. Fiedler*, 2 Kern. 40; *Berry v. Dwinel*, 44 Me. 267.

³ *Heard v. James*, 49 Miss. 236. In this case defendant cut trees without license on plaintiff's land and manufactured them into staves, and plaintiff brought replevin for the staves. See also *Sedg. Meas. Dam.* 578; *Brown v. Sax*, 7 Conn. 97; *Martin v. Porter*, 5 Mees. & Welb. 351. In the following cases the defendant was allowed the value of the labor necessary to change the form of the property. *Wild v. Holt*, 9 Mees. & Welb. 672; *Smith v. Gouder*, 22 Ga. 354. The last four cases are in trespass and trover.

⁴ *Warner v. Sauk, &c.*, 20 Wis. 492.

a case it has been *held* that its value could be fixed at the highest value between the taking and the trial.¹ Where plaintiff alleged that the property in dispute was worth \$500 in gold coin, and proved its value in legal tender at \$1,200 (over objections), the court admitted the evidence and upheld a verdict for \$950.²

§ 949. **Nominal damages are incident to success** in replevin, and are awarded without proof of actual injury on the principle that when one interferes with another's right of property damages may be awarded, even though the evidence shows that there has been no substantial injury.³ Nominal damages have been called "a peg to hang costs on," "a sum of money which has no quantity," etc.⁴ On any interference with the property rights of another, the law presumes some damage.⁵ Damages go with the recovery, whether of the property or its alternate value.⁶ Success upon *non cepit* does not entitle the defendant to a return of the property or to its value as a substitute, but simply to nominal damages.⁷ But the finding in plaintiff's favor of the right of possession shows that there has been an invasion of his rights sufficient in law to uphold the award of nominal damages, even though the jury do not expressly find that the detention was wrongful, and nominal damages may be awarded without an averment of special damage, and without proof of actual dam-

¹ Taylor v. Ketchum, 35 How. Pr. (N. Y.) 289; *Id.* 5 Robt. (N. Y.) 507.

² Tarpy v. Shepherd, 30 Cal. 181.

³ Cory v. Silcox, 6 Ind. 39; Smith v. Houston, 25 Ark. 184; School District v. Shoemaker, 5 Neb. 36; Creighton v. Newton, 5 Neb. 102.

⁴ Beaumont v. Greathead (2 M. G. & S.), 52 E. C. L. 498; Mellor v. Spateman, 1 Saund. n. 346 b; Strong v. Keene, 13 Irish L. R. 93.

⁵ Munroe v. Stickney, 48 Me. 462; McConnell v. Kibbe, 33 Ill. 175; Devendorf v. Wert, 42 Barb. 227; Stowell v. Lincoln, 11 Gray, 434. See Sedgwick on Meas. of Dam., 6 Ed. p. 55; Champion v. Vincent, 20 Texas, 811; Smith v. Whiting, 100 Mass. 122; Allaire v. Whitney, 1 Hill, 484; Williams v. Mostyn, 4 Mees. & W. 145; Young v. Spencer, 10 B. & C. (21 E. C. L.) 145.

⁶ Robinson v. Richards, 45 Ala. 354.

⁷ Douglass v. Garretts, 5 Wis. 85.

age.¹ Where it is shown that the property is wrongfully taken and unlawfully detained, the plaintiff is entitled to recover nominal damages without proof of actual damages.² The burden is upon the injured party to allege and prove the nature and amount of his damage. Unless he do so, his recovery will be limited to nominal damages.³ Simple proof of the taking will only support nominal damage.⁴ Where damages are proved, but not the amount, judgment can only be given for nominal damages.⁵ To recover substantial damages in trespass, some circumstances of aggravation or actual injury must be shown.⁶ The same rule is followed where defendant is found entitled to a return.⁷ Where the jury award damages for detention without finding that there was a detention, it is not good.⁸ Judgment cannot be rendered for damages where the jury omit to find and assess damages.⁹

§ 950. **To recover more than nominal damages, actual damages must be alleged and proved.**¹⁰ On a finding in favor of defendant, he is entitled to a judgment for nominal damages, at least, independent of proof of any actual loss.¹¹ Where plaintiff in replevin fails to prove any amount of damages he has sustained, he is entitled to nominal damages only.¹² Where the plaintiff fails in an action of replevin, in the absence of proof of actual damages the defendant is entitled to nominal damages only.¹³ Where the

¹ *Hammond v. Solliday*, 8 Col. 610 (9 Pac. 781).

² *Robinson v. Shatzley*, 75 Ind. 461.

³ *Mann v. Grove*, 4 Heisk. (Tenn.) 403.

⁴ *Phenix v. Clark*, 2 Mich. 327.

⁵ *Brown v. Emmerson*, 18 Mo. 103.

⁶ *Rose v. Gallup*, 33 Conn. 338.

⁷ *Seabury v. Ross*, 69 Ill. 533.

⁸ *Swain v. Roys*, 4 Wis. 150.

⁹ *Black v. Winterstein*, 6 Neb. 225.

¹⁰ *Washington Ice Co. v. Webster*, 62 Me. 341.

¹¹ *Frey v. Drahos*, 7 Neb. 194.

¹² *Smith v. Houston*, 25 Ark. 183.

¹³ *Seabury v. Ross*, 69 Ill. 533.

evidence furnishes no elements for the admeasurement of damages, it is error to tell the jury that they may give such damages to the plaintiff as they may find he has suffered.¹ Where there is no evidence of the value or amount of damages, a verdict in a fixed sum rests upon conjecture, and will be set aside.² In replevin for property distrained for rent, where an avowry is made, the amount for which it is made is the real matter in dispute, and the damages are merely nominal.³

§ 951. **Nominal damages as affected by demand and interest of the party.** If at the service of the order the defendant is not the owner, and has no special interest in the property, only nominal damages can be recovered against him if no demand was made; but if demand was made, and he refused to surrender the property, the rule would be otherwise.⁴ Nominal damages only should be allowed on judgment for defendant in replevin, where he has failed to show right in himself to the property in controversy.⁵

§ 952. **Rule where only a part of the property is recovered.** In case of a judgment for the plaintiff, and only a portion of the property is or can be returned, the damages for the unreturned property would be estimated by the rules above stated.⁶ So a judgment may be given that a portion of the property be delivered to the plaintiff and a portion to the defendant, and it should show what belongs to each.⁷ Where a part only of the property claimed is taken, the plaintiff should be permitted to elect to take that part and have judgment for the value of the remainder, and the jury

¹ Morrison v. Yancy, 23 Mo. App. 670.

² Ascher v. Schaeper, 25 Mo. App. 1.

³ Peyton v. Robertson, 9 Wheat. 527.

⁴ Homan v. Laboo, 1 Neb. 204.

⁵ Treat v. Staples, 1 Holmes, 1 (1st Circuit).

⁶ Field's Briefs, Section 205.

⁷ O'Keefe v. Kellogg, 15 Ill. 347; Williams v. Beede, 15 N. H. 483; Dowell v. Richardson, 10 Ind. 573. See Piazzek v. White, 23 Kan. 621 (33 American Reporter, 211).

should assess the parts separately at his request.¹ A defendant succeeding as to part of the chattels is entitled to costs.²

§ 953. **In contests between a mortgagee and an officer holding on writs against the mortgagor.** If the mortgagee win, he is usually entitled to recover the amount of his lien or mortgage claim, if it be less than the value of the property. If it equal that value, he is entitled to a return of the property or judgment for its full value. The result in this class of cases depends much upon the statute, as in some states the mortgagee is entitled to the possession of the property, no matter how much surplus there may be after paying his debt. Under other statutes he cannot replevin from the officer at all, but his lien is protected by the officer and paid out of the first proceeds.

§ 954. **The same—Illustrations.** Where the mortgagee brought replevin for property levied on by an officer for debts of the mortgagor and sold the property, and the finding was for defendant, on the ground that replevin would not lie by the mortgagee in such a case, but the evidence showed that the property was not worth more than the mortgage claim, *held*, that as the officer could only sell the mortgagor's equity of redemption, and that that was valueless, he should only recover nominal damages.³ When mortgaged chattels have been lawfully seized under an attachment against the mortgagor, the rule of damages in replevin by the sheriff against the mortgagee, who has unlawfully taken them from his possession, is the value of the property over the mortgage debt.⁴ In an action of replevin brought by a mortgagee of goods against a sheriff holding them under an order of attachment in a suit against a mortgagor, the true measure of damages in favor of the sheriff is the

¹ *Caldwell v. Bruggerman*, 4 Minn. 270.

² *Newell Mill Company v. Muxlow*, 51 Hun. (N. Y.) 453.

³ *Geisendorff v. Eagles*, 70 Ind. 418.

⁴ *Saxton v. Williams*, 15 Wis. 292.

amount called for by the writ, where the value of the goods equals or exceeds that sum.¹ But if the mortgage, lien exceeds the value of the property, the defendant (sheriff) is only entitled to nominal damages.² It is error to render a judgment for the value of the property in favor of a defendant in replevin who has only a special interest therein by virtue of its seizure on legal process.³

§ 955. **Mortgagee can only recover the amount of his claim** if that be less than the value of the property; if it be more, he is entitled to have the property returned, and if the party who took it from him acted *mala fide*. If it cannot be returned he is entitled to judgment for the amount of his claim. The damages are measured by the injury to the property caused by the unlawful acts. If the mortgagee gets more than is sufficient to satisfy the mortgage, he holds it for the benefit of the mortgagor.⁴ The mortgagee from whom chattels have been wrongfully replevied is entitled to judgment for their return, with any damages suffered from the taking, or for the amount of the mortgage debt, but cannot have judgment for the full value of the property if that exceeds the mortgage debt and costs.⁵ In an action of replevin a defendant, where lien under a chattel mortgage upon the goods replevied is sustained, cannot, in any event, recover beyond the value of the goods; and in the absence of any proof of such value, the appraisal made under the writ will govern.⁶ Where a chattel mortgagee brings a replevin to recover the possession of the mortgaged property, and the defendant by giving bond retains it, and the jury finds the value of the mortgaged property to be greater than

¹ Black v. Winterstein, 6 Neb. 224; Kersenbrock v. Martin, 12 Neb. 374 (1 N. W. 462).

² Pugh v. Calloway, 10 Ohio St. 488.

³ Williams v. Bresnahan, 66 Mich. 634 (33 N. W. 739).

⁴ Byron v. Chapin, 113 Mass. 308; Gooding v. Shea, 103 Mass. 360; Gordon v. Jenney, 16 Mass. 465.

⁵ Smith v. Phillips, 47 Wis. 202 (2 N. W. 285).

⁶ Wolrath v. Campbell, 28 Mich. 111.

the mortgage debt and interest, the judgment should be for the recovery of the property, or *the debt and interest*, and not for the recovery of the *value* of the property.¹ Where a mortgagee brings replevin before the whole debt secured by his mortgage is due, his lien should be protected for the amount to become due, as well as that past due.²

§ 956. **Where the taking was with malice**, the mortgagee may recover injury to the property without regard to the value of his interest. In an action of replevin by a mortgagee entitled to the immediate possession of the property replevied, if the taking and detention were both unlawful, he is entitled to recover the damages to the property caused directly by the taking and detention, although the property, when replevied, is of greater value than the amount due under the mortgage.³

§ 957. **An officer's damage is the face of the writ** under which he held the property if within the value of the property. Where the defendant in replevin lawfully held the property by virtue of a levy under an execution (the verdict being in his favor) the measure of his damages, within the value of the property, was the amount due upon the execution with legal costs and charges.⁴ The value of a sheriff's interest in goods is the value of his writs. If the verdict be for more, the court will compel a *remittitur* of the excess.⁵ A constable having levied upon personal property, the defendant in execution replevied the same. In the replevin suit the constable obtained judgment for the property, or its assessed value, at his election. He elected to take the money, which was paid him, and which exceeded the amount necessary to satisfy the execution. *Held*, that the constable was compellable by law to refund the surplus to the execution defend-

¹ *Wolfley v. Rising*, 12 Kan. 535.

² *Fowler v. Hoffman*, 31 Mich. 215.

³ *Allen v. Butman*, 138 Mass. 586.

⁴ *Welton v. Beltezore*, 17 Neb. 399 (23 N. W. 1).

⁵ *State v. Kinkaid*, 23 Neb. 641 (37 N. W. 612); *Aultman v. Stickler*, 21 Neb. 72 (31 N. W. 241).

ant.¹ Where an officer holds property under a valid writ, and it is taken from him by replevin, which on trial is not maintained, the officer should have judgment for a return of the property and costs, or for his damages, which are the amount of his writ and legal costs and charges, provided, always, that amount be within the value of the property. If his writ call for more than the value of the property as found by the jury, he would be entitled to that amount.² If the property of a judgment debtor in his possession or under his control be seized by a sheriff in execution, and afterward replevied from him by one who on trial is found to have no interest therein, the true measure of the officer's damage is the value of the property together with interest from the time when it was taken.³

§ 958. **Measure of damages where defendant held by execution** is the value of his writs, if they do not exceed the value of the property. Where goods taken on execution are replevied, and judgment is rendered against the plaintiff in the replevin suit, the damages should be the amount of the execution with costs.⁴ If defendant took the property as sheriff under an execution, and held it for the purpose of satisfying the execution debt, and the plaintiff in the replevin suit was the general owner of the property subject to the execution lien, the measure of his recovery would be limited to the execution debt and costs, if less than the value of the property; but if the debt and costs exceeded the value of the property, he would be entitled to recover to the same extent as any plaintiff who had obtained an order for the return of the property under a plea of ownership.⁵ Where

¹ Damm v. O'Connell, 1 Mo. App. 268.

² Black v. Winterstein, 6 Neb. 224.

³ Buck v. Remsen, 34 N. Y. 383; White v. Webb, 15 Conn. 302; Hall v. Jenness, 6 Kan. 356.

⁴ Hayden v. Anderson, 17 Iowa, 158; Dodge v. Chandler, 13 Minn. 114; La Crosse v. Robertson, Id. 291; Booth v. Ableman, 20 Wis. 21.

⁵ David v. Bradley, 79 Ill. 316; Booth v. Ableman, 20 Wis. 21; Jennings v. Johnson, 17 Ohio, 154.

in replevin against a sheriff holding the property under an attachment, and having no interest in it other than that of the attaching creditor, if the defendant recover, and the value of the property exceeds the amount claimed on the attachment, the amount of the sheriff's recovery is limited to the amount of the attachment, with interest and costs, and judgment for the entire value of the property is erroneous.¹

§ 959. **Where an officer is wrongfully dispossessed, his damage is the value of his writ and interest.** Where the United States marshal levied upon property to satisfy a judgment in the district court, and the execution defendant wrongfully repossessed himself of the property under a writ of replevin from a state court, that court, in determining the amount for which the marshal was entitled to judgment (where a return could not be had), should have treated the amount of the judgment in the United States court, with interest thereon to the day when the goods were replevied, as the measure of the marshal's interest in them on that day, and should also have allowed interest on that amount from that day as damages for the unlawful detention.²

§ 960. **But where the writs are for too much, he can only recover the amount justly due.** An officer has only such special interest in attached property in his possession as the lien of the attachment creates, and it is measured by the amount necessary to pay the debt for which the property was attached, and in an action of replevin against an officer to recover the attached property, evidence that the debt had been reduced by a sale of a portion of the property taken under the attachment is competent.³ A judgment in replevin

¹ *Clark v. Lamoreux*, 70 Wis. 508 (36 N. W. 393). See *Jennings v. Johnson*, 17 Ohio, 154; *Sutcliffe v. Dohrman*, 18 Ohio, 186; *Coe v. Peacock*, 14 Ohio St. 187; *Niagara Elevator Co. v. McNamara*, 2 Hun. 416; *Id.* 50 N. Y. Court of Appeals, 653; *Battis v. Hamlin*, 22 Wis. 669.

² *Booth v. Ableman*, 20 Wis. 21.

³ *Kerr v. Drew*, 90 Mo. 147 (2 S. W. 136); *Boutell v. Warne*, 62 Mo. 350; *Dougherty v. Cooper*, 77 Mo. 535; *Booth v. Ableman*, 20 Wis. 21; *Seaman v. Luce*, 23 Barb. 240.

against several attaching creditors should only be for the amount of the debts and costs due to those creditors whose writs of attachment were served prior to the replevin.¹

§ 961. **Cannot recover for use or detention in addition to value.** But in such cases he should not have damages for the detention or use of the property in addition to its value, for this would be compensating him twice for the same injury.² Where the property levied on is in the possession of the plaintiff, not the judgment debtor, the debtor laying no claim to it, the officer should only recover the value of his writ.³

§ 962. **His valuation evidence against him.** In replevin of goods from a sheriff who holds them under attachment, his appraisal in the attachment is *prima facie* evidence of value as against him, and if he claimed the goods were not worth so much, the burden was on him to show it.⁴

§ 963. **Where replevin against an officer is tried before the attachment suits, his lien will be protected.** In an action of claim and delivery against a sheriff who holds goods under attachments, if the action in claim and delivery be tried before the suits in attachment, the value of the sheriff's special property cannot be certainly determined, and the proper judgment to be rendered in such a case on a finding for the sheriff, where the property cannot be returned, is the face of his writ, if within the value of the property; but if it is afterwards determined that some of the writs called for more than was owing, the measure of the sheriff's damage will be so much less, notwithstanding the judgment in his favor for the face of the writs.⁵ Where, on the trial of a replevin suit in favor of the vendee of an attachment debtor, the officer seeks to justify under the attachment proceedings, which have not matured into a judgment, the fact of the in-

¹ McNorton v. Akers, 24 Iowa, 369.

² Garrett v. Wood, 3 Kan. 231.

³ Frey v. Drahos, 7 Neb. 194; Barney v. Douglass, 22 Wis. 464.

⁴ Carson v. Golden, 36 Kan. 705 (14 P. 166).

⁵ Wheaton v. Thompson, 20 Minn. 175.

debtedness charged in the affidavit for attachment at the time of the purchase must be established, and said affidavit is not conclusive proof of such fact.¹

§ 964. **Rule in replevin between different officers.** Where property in the hands of a United States marshal has been wrongfully seized under process from a state court, the state court may properly render judgment for a return to the marshal of such property, or payment to him of the value if return be not made, though the merits of plaintiff's claim are not adjudicated.² The one first taking lawful possession is entitled to hold the property pending the litigation. Where replevin is allowed between different officers to test the priority or validity of their writs, damages beyond the actual value of the property should not be given.³

§ 965. **As against an intruder, the officer is entitled to the full value of the property.** The law will not favor or assist a mere interloper. As against an intruder an officer will recover the full value of the property, though he cannot hold the surplus above his writ as against the true owner or other creditors.⁴ In an action of replevin against a sheriff who has taken property upon execution against third persons, and not from the possession of plaintiff, where the judgment is in favor of the sheriff it is not error to assess his damages, on a waiver of a return of the property, at the full value of the property, notwithstanding it exceeds the amount of the executions in his hands. The plaintiff had no right to the property whatever, and as between him and the sheriff the latter had the whole title, and would be bound

¹ *Manning v. Bresnahan*, 63 Mich. 584 (30 N. W. 189); *Cook v. Hopper*, 23 Mich. 518.

² *Cantril v. Babcock*, 11 Col. 143 (18 P. 342); *Parkes v. Wilcox*, 6 Col. 489.

³ *Goodman v. Church*, 20 Vt. 187.

⁴ *First National Bank v. Crowley*, 24 Mich. 499; *Dilworth v. McKelvy*, 30 Mo. 150; *Farnham v. Moore*, 21 Me. 508; *Buck v. Remsen*, 34 N. Y. 383; *Long v. Cockrell*, 55 Mo. 93.

to account for the surplus.¹ In replevin against a constable for an unlawful seizure where defendant put in issue plaintiff's title to the property, and the jury found for the plaintiff, and assessed the value of the property at a greater sum than the amount of the execution, judgment should be for the return to the constable of the entire property, or payment to him of its entire assessed value, and not merely for that of an amount equal to the execution. The presumption being that the jury found plaintiff had no title at all to the property,² and in such a case, if the property sell for more than enough to satisfy the writs held by the officer, other creditors may get the surplus, the plaintiff in replevin has no claim upon it.³ If the replevin is by a mere stranger, the amount of the debt is immaterial, as the sheriff would hold in trust any surplus for the general owner.⁴

§ 966. **An intruder is liable for damages whether the other party owns the property or not.** A plaintiff in replevin who fails to establish his right to the property is liable to the defendant in damages, although such defendant does not own the property.⁵

§ 967. **Damages against sheriff or other officer seizing under a writ.** It is well settled that an officer who seizes property under a writ of attachment or execution is liable if he seizes the wrong person's property. The true owner may recover his damages in trespass or trover, or he may bring replevin and recover the property or its value. If the true owner brings replevin and prevail, he is entitled to a return or the proved value of the goods. What the sheriff may have sold them for is not the measure of the damages

¹ *First National Bank v. Crowley*, 24 Mich. 492; *Broodwell v. Paradise*, 81 Ill. 474; *Atkins v. Moore*, 32 Ill. 240.

² *Long v. Cockrell*, 55 Mo. 93.

³ *Blobaum v. Gambs*, 56 Mo. 183.

⁴ *Atkins v. Moore*, 82 Ill. 240; *Fallon v. Manning*, 35 Mo. 271; *Farnham v. Moore*, 21 Me. 508; *Lyle v. Barker*, 5 Binn. 459.

⁵ *Burt v. Burt*, 41 Mich. 82.

in such a case.¹ If the sheriff act in good faith, exemplary damages are never allowed against him.² If the sheriff, under a writ, make an excessive levy, he is liable to the judgment debtor for the excess over enough to satisfy the writ, and for the detention and any injury this excess may have received.³ Or if he act with malice his writ is no protection to him.⁴ But malice on the part of the plaintiff who had the process issued does not add to the liability of the officer if he do but his duty.⁵

§ 968. **As against a stranger, the special owner is entitled to the full value of the property,** being accountable to the true owner for all over his special claim, and the law will not permit an intruder to take the property from one having a legal though not an entire right. This rule is well established, and is of ancient origin.⁶ It will not be presumed as a matter of law, because the right of possession only is found in the defendant. The whole value of the property is not the proper measure of his damages.⁷ The extent of a special interest or ownership must always be shown. In an action to recover property, in which the defendant claims only a special property, if the plaintiff fail to maintain his suit judgment should be given for the defendant

¹ *Pozzoni v. Henderson*, 2 E. D. Smith (N. Y.), 146; *Livor v. Orser*, 5 Duer, 501; *King v. Orser*, 4 Duer (N. Y.), 431; *Russell v. Smith*, 14 Kan. 374.

² *Beveridge v. Welch*, 7 Wis. 45; *Morris v. Baker*, 5 Wis. 389; *Meshke v. Van Doren*, 16 Wis. 320; *Barney v. Douglass*, 22 Wis. 464; *Noxou v. Hill*, 2 Allen, 215.

³ *Waterbury v. Westervelt*, 5 Seld. (N. Y.) 598.

⁴ *Nightingale v. Scannell*, 18 Cal. 315; *McDaniel v. Fox*, 77 Ill. 345.

⁵ *Nightingale v. Scannell*, 18 Cal. 315.

⁶ *Lyle v. Barker*, 5 Binn. (Pa.) 458; *Frei v. Vogel*, 40 Mo. 150; *Fallon v. Manning*, 35 Mo. 271; *Frey v. Drahos*, 7 Neb. 194; *Dilworth v. McKelvy*, 30 Mo. 150; *Booth v. Ableman*, 20 Wis. 21; *Leonard v. Whitney*, 109 Mass. 266.

⁷ *Latimer v. Motter*, 26 Ohio St. 480. For instance, if the defendant was an officer holding under an execution, and the amount called for by the execution was greater than the value of the property, his damage would be the full value of the property.

for the entire value of the property, as he is responsible to the general owner for its value beyond his claim as special owner,¹ though a contrary doctrine has been held.² On principle, the doctrine is as laid down in the first lines of this section.

§ 969. **Pledge-bailor and bailee-stranger.** There is a distinction as to the rights of the bailee against the general owner and a stranger. In a suit against a stranger by the bailee the judgment should be for the full value of the property, because the bailee is answerable over for the excess of his debt to the general owner; but in a suit between the bailee and the general owner the judgment should be limited to the value of the specific interest of the bailee in the property.³

§ 970. **In contests between the general and special owners** the special owner can only recover to the extent of his interest in the property, if he prevail in the suit. In a replevin suit by the general owner against a party having only a special interest, the recovery by the special owner against the general owner must be limited to the amount of the special owner's particular interest. In the case of an officer holding under an execution, his interest cannot be greater than was the interest of the execution debtor.⁴ If a trustee recover in replevin the property conveyed to him to secure a debt, the judgment should be for the property at its value, not to exceed what will pay the legal charge upon it. It would be a vain thing to award to a trustee the possession of a large amount of property or a large sum of

¹ *Morss v. Stone*, 5 Barb. (N. Y.) 516; *Buck v. Remsen*, 34 N. Y. 383; *Frei v. Vogel*, 40 Mo. 149; *Fallon v. Manning*, 35 Mo. 271; *Madison National Bank v. Farmer*, 5 Dak. 282 (40 N. W. 345); *Dolen v. Vandemark*, 35 Kan. 304 (10 P. 848).

² *Seaman v. Luce*, 23 Barb. (N. Y.) 240; *Rhoads v. Woods*, 41 Id. 471; *Battis v. Hamlin*, 22 Wis. 669.

³ *Jones v. Hicks*, 52 Miss. 682; *Lyle v. Baker*, 6 Binn. 457; *Harkis v. Demont*, 9 Gill. 14; *Benjamin v. Stemple*, 13 Ill. 468; *Kennedy v. Whitehead*, 4 Pick. 466; *Heyden v. Smith*, 13 Coke, 69.

⁴ *Dilworth v. McKelvy*, 30 Mo. 149; *Gillham v. Kerone*, 45 Mo. 487.

money to pay a small sum, and immediately thereafter to return the surplus to the defendant, and neither party can complain of such a judgment, for their full rights are preserved.¹ Where defendant in a replevin suit has established a lien for sawing upon a quantity of lumber, of which that replevied was only a portion, a ruling which permits the assessment of their damages at such a portion of their whole lien as the lumber replevied bore to the whole amount subject to their lien, is not one of which the plaintiffs can complain. Such apportionment is even more liberal to the plaintiff than the law requires.² Where, in an action of replevin by the general owner of property against one who has a special interest therein, the property has been delivered to plaintiff, the true value to be assessed and recovered by the defendant—where successful—is the value of his special or limited interest in the goods recovered.³ Where the suit is brought by one holding a special property against the general owner, he recovers, if at all, not the value of the property, but his special interest.⁴ In an action to recover possession of personal property by one having a special interest therein, against the general owner, the value of the property as found should not exceed the value of the special interest.⁵

§ 971. **Special ownership measure of damages.** In an action of replevin where the verdict is in favor of the defendant, whose ownership is special by reason of a chattel mortgage or other lien, the measure of his damages in case a return cannot be had is the amount due him upon his lien

¹ *Bates v. Snider*, 59 Miss. 497.

² *Chadwick v. Broodwell*, 27 Mich. 6.

³ *Pico v. Martinez*, 55 Cal. 148; *Seaman v. Luce*, 23 Barb. 240; *Broodwell v. Paradise*, 81 Ill. 474; *Ingersoll v. Van Bokkelen*, 7 Cow. 681; *Rhoads v. Woods*, 41 Barb. 471.

⁴ *White v. Webb*, 15 Conn. 305; *Faulkner v. Brown*, 13 Wend. 64; *Atkins v. Moore*, 82 Ill. 240; *Benjamin v. Stremple*, 13 Ill. 468; *Battis v. Hamlin*, 22 Wis. 669; *Davidson v. Gunsolly*, 1 Mich. 388.

⁵ *Townsend v. Bargy*, 57 N. Y. 665; *Fowler v. Haynes*, 91 N. Y. 346; *Allen v. Judson*, 71 N. Y. 77.

if within the value of the property as found by the jury. But such damages should in no case exceed the value of the property;¹ but between the special owner and a stranger he would be entitled to full value, as we have just seen. Where the proofs in replevin show clearly and without contradiction that the defendant, if in possession, was a possessor without any valuable interest in the property, but yet require judgment in his favor for want of a proper demand, he can recover no damages beyond his special interest, which would be merely nominal; and a judgment for damages for the full value of the property is erroneous.²

§ 972. **Prospective profits are too remote, and are not an element of damage.** Such damages are regarded as speculative rather than real.³ While the rule of damages in replevin is to fully indemnify the prevailing party for all loss, the loss must be real and not imaginary or speculative.⁴ The profits of an illegal business cannot be an element of damage in any case.⁵ Damages from prospective loss of sales or customers, or profits which might have been made in the filling of existing contracts, are too remote and indefinite to become an element of damage.⁶

§ 973. **The same—Illustrations.** The expected profits of a patent machine cannot be allowed.⁷ Profits which are expected from the use of circus horses in the circus business

¹ *Cruts v. Wray*, 19 Neb. 582 (27 N. W. 634); *Jennings v. Johnson*, 17 Ohio, 154; *Suteliffe v. Dohrman*, 18 Ohio, 186; *Coe v. Peacock*, 14 Ohio St. 187; *Lloyd v. Goodwin*, 12 S. & M. (Miss.) 223; *Booth v. Ableman*, 20 Wis. 22; *Warner v. Hunt*, 30 Wis. 200; *Childs v. Childs*, 13 Wis. 19; *Williams v. West*, 2 Ohio St. 86; *Rhoads v. Woods*, 41 Barb. 471; *Allen v. Judson*, 71 N. Y. 77; *Weaver v. Darby*, 42 Barb. 411; *Townsend v. Barge*, 57 N. Y. 665; *Dolan v. Van Demark*, 35 Kan. 304 (10 P. 848).

² *Darling v. Tegler*, 30 Mich. 54.

³ *Bonesteel v. Orvis*, 22 Wis. 522; *Crabbs v. Kountz*, 69 Md. 60 (13 A. 591).

⁴ *Baker v. Drake*, 53 N. Y. 212; *Loker v. Damon*, 17 Pick. 284.

⁵ *Houghton v. Peck*, 8 Pa. St. 42.

⁶ *Washington Ice Company v. Webster*, 62 Me. 341.

⁷ *Houghton v. Peck*, 8 Pa. St. 42.

cannot be allowed.¹ The expected profits of a stock speculation cannot be allowed.² As a general rule, loss by a mercantile firm of the expected profits not received because of the closing up of the business are not an element of damage proper, to be allowed in a replevin suit, though the authorities are not uniform on this point.³ Estimates of profits to accrue are so unreliable as to be worthless as a means of arriving at the actual damages.⁴ Where there is a judgment of *retorno*, the value of the use of the property during detention is the true measure of damages. Speculative or expected profits from the use should not be given.⁵

§ 974. **Loss of probable profits are sometimes allowed** where it is quite certain that they would have been immediately realized, if it had not been for the interference of the losing party by his unlawful seizure. Let us illustrate this by reference to the decided cases. It has been *held* that near and stable or probable profits could be allowed.⁶ Where plaintiff's bridge was carried away by the wrongful act of the defendant, the loss of tolls during the time necessarily required to rebuild it is a proper element of damage.⁷ Where a landlord wrongfully cut off steam power from his tenant's mill, the tenant had a right to suppose it permanent, and disposed of his stock, machinery, and fixtures on the best terms he could. It was *held* that the landlord was a wrongdoer, and was liable for any loss that was sustained at such sale, and that he was also liable for the loss occasioned from the breaking up of the tenant's business, and

¹ Butler v. Mehrling, 15 Ill. 490. See Brannin v. Johnson, 19 Me. 361; Seldner v. Smith, 40 Md. 603.

² Baker v. Drake, 53 N. Y. 211.

³ Selden v. Cashman, 20 Cal. 57; Moore v. Schultz, 31 Md. 418; Oviatt v. Pond, 29 Conn. 479; Allred v. Bray, 41 Mo. 484.

⁴ Allis v. McLean, 48 Mich. 428 (12 N. W. 640); McKinnon v. McEwan, 48 Mich. 106 (11 N. W. 828).

⁵ Butler v. Mehrling, 15 Ill. 488; Powers v. Florance, 7 La. Ann. 524.

⁶ Mayberry v. Cliffe, 7 Cold. (Tenn.) 124.

⁷ Sewell's Falls Bridge v. Fisk, 23 N. H. 171. See Palm v. The O. & M. R. R., 18 Ill. 217.

that the proper way to measure the damage on this account was to ascertain the profits which the business had yielded for a reasonable period next preceding the time when the injury was inflicted, leaving the other party to show the reason, if any such existed, why the expected profits would have been less, as depression in values, etc.¹

§ 975. **Rule of damages—Summary.** 1st. In actions for taking and detaining personal property, where no question of fraud, malice, or oppression (or willful wrong, either in the taking or detention) intervenes, the measure of damages is the value of the property at the time of the taking, or conversion, or illegal detention, with interest thereon to the time of trial; and this is a rule of law to be decided by the court. 2d. That where the trespass, detention, or conversion is attended by circumstances of malice, fraud, oppression, or willful wrong, the law abandons the rule of compensation, in a legal sense, and the measure of damages becomes a matter for the consideration of the jury, guided by the evidence before them. 3d. That under the first rule stated may be embraced all cases where the defendant, neither in the taking nor in the detention or disposition of the property, has been guilty of any wrong, but acts in good faith, and with no intent to injuriously affect plaintiff's rights. That under the second rule above stated may be embraced, 1st. All cases where the original act was willful and wrongful. 2d. Or where the original act was *bona fide*, but the subsequent detention, sale, or other disposition of the property, after a knowledge of plaintiff's claim, was willful and injurious. 3d. Or where the original act, and subsequent disposition of the property for a greater price than its market value, at the time of the original taking, were all in ignorance of the plaintiff's rights, but the defendant seeks to retain the difference, as a speculation resulting from his original unintentional wrong. 4th. Or where the property

¹ Chapman v. Kirby, 49 Ill. 219. See White v. Moseley, 8 Pick. 356; Cavenport v. Ledger, 80 Ill. 578; Dewint v. Wiltsie, 9 Wend. 326.

in controversy has some peculiar value to the plaintiff, and is willfully withheld from the rightful owner, or he has been deprived thereof by the willful and wrongful act of the defendant. In all such cases it is the peculiar province of the jury to find such damages, according to the convictions of their own understandings, as are consistent with right—not as a matter of law, under the control and direction of the court, but as a rule of remedial justice, resting in their discretion.¹

§ 976. **In conclusion—Author's rule—Postulates.** On the difficult subject of damages the author suggests the following as postulates, merely:

First. I. That where plaintiff has received the property on his writ, and on trial judgment is awarded for him, his damages should be a reasonable sum for its use, if usable, while unlawfully detained from him by defendant, and full costs in any event.

II. If the taking and detention by defendant was willful and without color of right, to this should be added any expense or loss of time to which plaintiff is put to obtain his property, including a reasonable sum for necessary attorney's fees—making full and complete compensation.

Second. I. If defendant recover a judgment for a return, his damages should be the costs, and if the property is usable, its reasonable usable value from the taking under the writ to the day of trial.

II. If the suing out of the writ was willful and malicious, without color of right, to this should be added any expense or loss of time to which defendant has been put in defending his possession, including a reasonable sum for necessary attorney's fees—making full and complete compensation.

III. If the property has been increased in value simply by lapse of time, with no expenditure of skill or labor on the part of plaintiff beyond the ordinary care any prudent man

¹ Whitfield v. Whitfield, 40 Miss. 352.

would give his own property of like kind, then the increase or increase of value should go with the property to the defendant.

IV. If the increase is directly attributable to the superior skill and business ability of plaintiff, and his suing out of the writ was malicious and without color of right, or his subsequent detention was malicious and for the sole purpose of annoying the defendant, or deriving a pecuniary advantage himself, then the increase or the increase of value should go with the property to the defendant.

V. But where the plaintiff acted in good faith and upon a color of right, and the increase of value is due to his skill, then the defendant should receive full compensation for use and trouble, and then the plaintiff should be allowed a fair sum for his labor, skill, and outlay in producing the result, if there be so much left. If it has increased in value so that there is still a surplus, it should be divided, part to the defendant who made the forced loan of capital, and part to the plaintiff who furnished the skill and experience.

Third. Where the property has decreased in value from any cause while in the hands of the plaintiff, if the property is returned this decrease in value should be given as damages. If not returned it should be valued as of the date of the taking. The plaintiff can derive no advantage from the decrease in value.

Fourth. I. In all cases where the property can be returned, the value should be placed so high as to compel a return, as the return, and not damages, is the object of replevin.

II. If the plaintiff acted in good faith under a color of right, and the property cannot be returned through no willful act of his, the value should be fixed at the time and place of the taking, and interest allowed on that value.

III. If the suing out of the writ was willful or malicious and without color of right, or if the property has been de-

stroyed or converted by the willful or negligent act of the plaintiff, the value may be fixed at any reasonable time after the taking, or at the natural market for such property, and should not be fixed at less than the plaintiff realized out of his ill-gotten property, and enough more to fully compensate defendant for all loss in money, time, and counsel fees.

Fifth. Where the plaintiff does not get the property, or the defendant bonds and keeps it, the same rules apply with simple change of parties.

CHAPTER XXXII.

EVIDENCE.

	Section.		Section.
The nature and scope of the evidence	977	sufficient to show possession by defendant	991
Evidence must be confined to the issues	978	The identity of the property should be shown	992
Evidence must be confined to status at commencement of the action	979	Variance	993
Matters of inducement are no part of the traverse . .	980	Conversion must be shown .	994
Facts admitted by the pleadings need not be proved .	981	In replevin, the question of value is not in issue . .	995
The formal negative averments need not be proved	982	On the subject of value, the affidavit is competent but not conclusive	996
Evidence of any matter necessary to understand the main issue should be admitted	983	The appraisement is not conclusive of value	997
<i>Res gestae</i>	984	Value should be shown, though no question is raised thereon	998
<i>Res gestae</i> —Intention and declarations of third persons when admissible .	985	Though a contrary rule has been followed	999
Declarations of plaintiff not admissible in his favor .	986	Value—How shown	1000
<i>Res gestae</i> —Declarations of party in possession . .	987	Evidence under a general denial	1001
When and how far statements of a vendor admissible	988	Issue in replevin—Evidence under a general denial .	1002
It must be shown that defendant had possession at the commencement of the action	989	The same—Illustrations .	1003
Proof that property was in defendant's possession—How made	990	Evidence admissible under <i>non detinet</i>	1004
Slight circumstances are suf-		Evidence under plea of property in defendant . . .	1005
		Where the question is one of title, plaintiff must show both title and right to possession	1006
		The writ of attachment under which an officer justifies is proper evidence .	1007

	Section.		Section.
An officer must prove his official character . . .	1008	Need not be definite as to place of detention . . .	1016
Service on the attachment—Defendant must be shown to conclude him . . .	1009	Possession of personal property is <i>prima facie</i> proof of ownership . . .	1017
What may be shown where defense is title under a writ—Illustrations . . .	1010	Right of possession proved by proof of ownership . .	1018
The same . . .	1011	Illustrations of proper evidence in cases depending upon particular facts . .	1019
As to matters accruing after suit . . .	1012	The same . . .	1020
Rule of evidence where the foundation of title is an execution . . .	1013	Illustrations of matter held too remote from the main issue . . .	1021
Where fraud is the issue, considerable latitude in the proof should be allowed .	1014	Proper evidence in replevin of exempt property . . .	1022
The burden is on the pleader of fraud to prove it . .	1015	How far title to real estate may be considered, and how shown . . .	1023

§ 977. **The nature and scope of the evidence** admissible in replevin depends wholly upon the nature and source of plaintiff's title or right of possession and the nature of the defense made. The investigation is not closely confined to the naked question of title or right of possession, as these, especially the latter, are frequently but conclusions drawn from other facts and circumstances, which must be investigated and understood in order that a correct conclusion may be arrived at, and the evidence may be such as goes to establish or controvert these incidents or circumstances. The pleadings, evidence, and judgment in an action of replevin should be confined to the points and questions necessary to elucidate the right of plaintiff to the immediate possession of the property in question at the commencement of the suit.¹

§ 978. **Evidence must be confined to the issues made by the pleadings.** The issues made by the pleadings is a question of law to be decided by the court, and depends on the law and the practice in that jurisdiction. In replevin the evidence

¹ Blue Valley Bank v. Bane, 20 Neb. 294 (30 N. W. 64).

must be confined to the issues made by the pleadings. The title of a third party not set up by them cannot be tried.¹ Where replevin is brought on the ground that defendant has possession without right and unlawfully detains, such allegations constitute the gravamen of the complaint against the defendant, and must be proved to enable the plaintiff to recover.² Where there are several plaintiffs, the proof must show that they were all entitled to possession. Title shown to exist shortly before the suit raises a *presunp'tion* of continued ownership.³ In replevin it is competent to disprove plaintiff's title to the goods, and one way to do this is to show that some one else owns them. A plaintiff in replevin cannot be allowed to recover upon a ground which he has once repudiated in the action.⁴ Where the plaintiff claims the entire ownership of the property, a recovery cannot be had upon proof that he was the owner of three-fourths only of the article or thing replevied.⁵ A plaintiff suing as the sole owner, in order to recover, must prove that he was the sole owner, and is entitled to the exclusive possession of the property.⁶ It is not error to exclude evidence of a defense upon a ground not alleged when the demand was made.⁷

§ 979. **Evidence confined to status at commencement of action.** In replevin the question is the right to the possession of the property at the commencement of the action, and evidence as to conduct of plaintiff at a sale of the property some time after the taking is inadmissible.⁸ The issue in replevin is upon the right of possession to the property at the commencement of the suit.⁹ A plaintiff in replevin

¹ Hartt v. McNeil, 47 Mo. 526.

² Krug v. Herod, 69 Ind. 78; Baer v. Martin, 2 Ind. 229; Ridenour v. Beekman, 68 Ind. 236.

³ Smith v. Graves, 25 Ark. 458.

⁴ Nicholson v. Dyer, 45 Mich. 610 (8 N. W. 515).

⁵ Eakin v. Eakin, 63 Ill. 160; Reynolds v. McCormick, 62 Ill. 412.

⁶ Underwood v. White, 45 Ill. 437.

⁷ Town v. Taber, 34 Mich. 262.

⁸ Kay v. Noll, 20 Neb. 380 (30 N. W. 269).

⁹ Loomis v. Youle, 1 Minn. 175.

must recover, if at all, upon the strength of his own claim, and a failure to prove his right to the immediate possession of the property, where the illegal detention is denied, is a failure of proof upon a material point.¹ In replevin the question submitted to the jury is, In whom is the title to the property? and the testimony should be confined strictly to this issue.² In actions of replevin, where the evidence of title is conflicting, the question must be submitted to the jury, although the weight of evidence is on one side.³

§ 980. **Matter of inducement is no part of the traverse.** The proof must be governed by the issues made, and not the reasons for making such issues. Where the defendant pleads property in himself or a third person, and traverses the plaintiff's right, the averment of property in defendant or a third person is only inducement to the traverse, and the plaintiff must take issue on the traverse, and not on the inducement. Under such a plea the burden of proof as to the title to the property is upon him. But where the plea is property in the defendant or in a third person, without a traverse of the plaintiff's right, it leaves the burden of proof upon the defendant to establish the proof of his plea.⁴

§ 981. **Facts admitted by the pleadings need not be proved.** The plaintiff need not prove facts alleged in the complaint which are admitted by the answer, and this applies to demand before suit.⁵ Where in replevin plaintiff claims under a chattel mortgage which he attaches to his pleadings, and defendant does not deny the execution of a mortgage, it is not necessary for plaintiff to prove said mortgage or the amount due thereon.⁶

¹ *Bardwell v. Stubbett*, 17 Neb. 486 (23 N. W. 344).

² *Sellars v. Kelly*, 45 Miss. 323.

³ *Anchor Milling Co. v. Walsh*, 24 Mo. App. 97.

⁴ *Chandler v. Lincoln*, 52 Ill. 74; *Reynolds v. McCormick*, 62 Ill. 412; *Constantine v. Foster*, 57 Ill. 36; *Chandler v. Lincoln*, 52 Ill. 74; *Anderson v. Talcott*, 1 Gilm. 371.

⁵ *Jones v. Spears*, 47 Cal. 20.

⁶ *Mills v. Kansas Lumber Co.*, 26 Kan. 574.

§ 982. **The formal negative averments need not be proved** under a general denial, as it does not raise an issue on them. They must be specially pleaded as a defense if relied upon by defendant. In a suit before a justice of the peace to recover personal property, the plaintiff need not prove the averments in his affidavit that it "had not been taken by "virtue of any tax, etc.,¹ nor seized on execution," etc. If such is defendant's claim, it should be set up affirmatively as a defense.

§ 983. **Evidence of any matter necessary to understand the main issue should be admitted.** In an action of replevin for a horse, the plaintiff offered to prove that the defendant gave a general order to his servants, before the commencement of the suit, not to deliver the horse to the plaintiff. *Held*, that the evidence was admissible as tending to prove an unlawful detention.² Where an agent deposited in a bank a box of specie for his principal, but took a certificate of deposit in his own name, *held*, that a jury were authorized to infer a conversion.³ In replevin against a city treasurer for property levied upon to satisfy a tax assessed against plaintiff's husband it was proper for plaintiff, after proving its execution, to introduce the bill of sale by which her husband had transferred the property to her, and to show that she had insured the property and used it as her own.⁴

§ 984. **Res gestæ.** Anything which properly belongs to or explains the transaction in question and which would be admissible under the rules of evidence in any form of action is admissible in replevin. If any difference, more latitude is allowed in a replevin action. Where one person takes and removes goods claimed by another, declarations made by the parties at the time of such taking are a part of the *res gestæ* and admissible in evidence in replevin for the

¹ Carney v. Doyle, 14 Wis. 270.

² Johnson v. Howe, 7 Ill. (2 Gilm.) 342.

³ Ringo v. Field, 6 Ark. 43.

⁴ Hall v. Moriarity, 57 Mich. 345 (24 N. W. 96).

goods.¹ Plaintiff claimed title to the property, based upon a present from a brother, a minor, who had been emancipated by his father. What was said at the time of the presentation is a part of the *res gestæ*, and should be admitted, as also should evidence of the financial standing of the family at the time of the alleged gift and emancipation.² In a replevin action where the issue turned upon the *bona fides* of a sale to plaintiff from the debtor of defendants, testimony as to what was said and done by buyer and seller about the time of the alleged sale is proper.³

§ 985. *Res gestæ*—Intention and declarations of third persons, when admissible. In replevin, where a party claims by purchase from a third person, the declarations of that person while in possession are proper evidence against his vendee. Where the intention with which an act was done is immaterial, proof of the intention may be rejected, but declarations of a party at the time he does the act are part of the *res gestæ* and admissible.⁴ In an action of claim and delivery of personal property, the books of account of a third person, not a party to the suit, are *res inter alios actæ* as to the defendant, and not admissible. To make the declarations of one from whom a party obtains title to property admissible in evidence against the latter they must have been made during the time the interest in the property was vested in the person making the declarations.⁵ The rule of law is that where it becomes important to inquire into the nature of an act, or the character of possession of property, proof of what the person said while

¹ Resch v. Senn, 28 Wis. 286.

² Wambold v. Vick, 50 Wis. 456 (7 N. W. 438).

³ Locke v. Hedrick, 24 Kan. 763.

⁴ Kuhns v. Gates, 92 Ind. 66. See White & Sons v. Woodruff, 25 Neb. 804 (41 N. W. 781-5).

⁵ Watrous v. Cunningham, 65 Cal. 410 (4 P. 408); Id. 71 Cal. 30 (11 P. 811). See Minthon v. Lewis, (Iowa) 43 N. W. 465.

⁶ Sumner v. Cook, 12 Kan. 162.

performing the act, or while the possession continued, is admissible in evidence.¹

§ 986. **Declarations of plaintiff not admissible in his favor.** Acts and declarations of plaintiff in replevin are not admissible in his favor.² While as a general rule the declarations of a party are not admissible in his behalf, yet, where they accompany some particular act which they serve to explain, they form an exception and are admissible.³

§ 987. **Res gestæ—Declarations of party in possession explanatory of the possession, or explanatory of the title** he is claiming, may be given in evidence by himself or those holding under him, where either of these matters is properly in issue. But they are proof only that such was the *character of the possession* or such was the title claimed. They are no evidence of the title actually held; and where the issue is not what was the nature of the possession, nor what was the title claimed, but which party, plaintiff or defendant, was the actual owner, such declarations are in-

¹ *Durham v. Shannon*, 116 Ind. 403 (19 N. E. 190). This case is where it was sought to show the admissions of a decedent in replevin against his administrator. As to the competency of a witness, the accepted rule is not to regard the mere letter of the statute, but to look to its spirit and purpose. See *Clift v. Shocby*, 77 Ind. 297; *Wiseman v. Wiseman*, 73 Ind. 112; *Ketcham v. Hill*, 42 Ind. 64; *Peacock v. Albin*, 39 Ind. 25. As to when the testimony of the surviving party to the transaction should be excluded on account of the death of the other party, see *Taylor v. Duesterberg*, 109 Ind. 165; *Low v. Freeman*, 117 Ind. 341 (20 N. E. 242). As to certain computations made, see *Wintrobe v. Fluke* (Kan.), 21 P. 249. As to conversations in absence of party, see *Doyle v. Dobson* (Mich.), 42 N. W. 137.

² *Roach v. Binder*, 1 Col. 322.

³ *Stone v. Bird*, 16 Kan. 488; *Oden v. Stubblefield*, 4 Ala. 42; *Thompson v. Merohenny*, 17 Ala. 366; *Upson v. Rasford*, 29 Ala. 188; *Overseers v. Overseers*, 2 Caine, 106; *Willis v. Farley*, 3 Cor. & Payne, 395; *Yarbrough v. Arnold*, 20 Ark. 592; 1 Phillips on Ev. (C. H. & Edw. notes) 188 and note. See on this general subject, *Frolick v. Presby*, 29 Ala. 462; *Gillespie v. Burlison*, 28 Ala. 563; *Arthur v. Gayle*, 38 Ala. 259; *Gordon v. Clapp*, 38 Ala. 357; *Bragg v. Massie*, 38 Ala. 89; *Darrett v. Donnelly*, 38 Mo. 492.

admissible.¹ As a general rule it is only declarations against a party's interest that are admissible in replevin as in other actions.² Declarations by a party to the action in possession of personal property, as to her ownership thereof, accompanying some principal fact which they serve to explain and qualify, are sometimes said to be a part of the *res gestæ*, but as the admissibility of such declarations is an exception to the general rule that the declarations of a party are not competent evidence in his own behalf, they should be allowed only with all the restrictions and limitations imposed upon them.³

§ 988. **When and how far statement of a vendor admissible.** In a case of replevin, where two parties claimed the horse in question, it was error to permit them to introduce in evidence the declarations of their respective vendors

¹ *Stone v. O'Brien*, 7 Col. 458 (4 P. 792). See *Warring v. Warren*, 1 Johns. 340; *Swindell v. Warden*, 7 Jones' Law, 575; *Turner v. Belden*, 9 Mo. 787; *Holmes v. Sawtelle*, 53 Me. 179.

² *Morrill v. Titcomb*, 8 Allen, 100; *McGough v. Wellington*, 4 Allen, 502; *Osgood v. Coates*, 1 Allen, 77; *Blake v. Everett*, 1 Allen, 248; *Smith v. Martin*, 17 Conn. 399; *Ware v. Brookhouse*, 7 Gray, 454; *Norton v. Pettibone*, 7 Conn. 319; *Carrier v. Gale*, 14 Gray, 504; *Applegate v. McClurg's Heirs*, 3 Marshall, 304; *Whitfield v. Whitfield*, 40 Miss. 553; *Jackson v. Bard*, 4 Johns. 230; *Gibney v. Marchay*, 34 N. Y. 301; *Jackson v. Miller*, 6 Cow. 751; *Peaceable v. Watson*, 4 Taunt. 16; *Criddle v. Criddle*, 21 Mo. 522; *Doe ex dem. Human v. Pettitt*, 5 Barn. & Ald. 223 (7 E. C. L. 75); *Doe ex dem. Stousburg v. Arkwright*, 5 Carr & Payne, 575 (24 E. C. L. 462); *Newell v. Horn*, 47 N. H. 381; *Ellis v. Howard*, 17 Vt. 330; *Smith v. Powers*, 15 N. H. 547; *Shepherd v. Thompson*, 4 N. H. 213; *Pitts v. Wilder*, 1 N. Y. 525; *Austin v. Thompson*, 45 N. H. 118; *Wendell v. Abbott*, 45 N. H. 353; *Watson v. Bissell*, 27 Mo. 220; *Kyle's Admr. v. Kyle*, 15 Ohio St. 15; *Shackleford v. Smith*, 5 Dana, 240; *Haysett v. Ellis*, 17 Mich. 371; *Murray v. Cone*, 26 Iowa, 276; *McPeake v. Hutchinson*, 5 S. & R. (Pa.) 295; *Weidman v. Kohr*, 4 S. & R. 174; *Chase v. Ewing*, 51 Barb. 597; *Vrooman v. King*, 36 N. Y. 477; *Jackson v. McCall*, 10 Johns. 377; *Jackson v. Vredenburgh*, 1 John. 159; *Abeel v. Van Gelder*, 36 N. Y. 513; *Whiteford v. Burekneyer*, 1 Gill. 127; *Devries v. Phillips*, 63 N. C. 207; *Hedrick v. Gobble*, 63 N. C. 48; *Brubaker v. Poage*, 1 Monroe, 125; *Regina v. Birmingham*, 101 E. C. L. 767-9; *Berkéley Peerage Case*, 4 Camp. 415; *Baker v. Kelly*, 41 Miss. 696.

³ *Reiley v. Haynes*, 38 Kan. 259 (16 P. 440).

made to third persons, and in the absence of the other, but the declarations of the respective vendors made before either had parted with his alleged title, and when both were present, would be competent to be shown by either party.¹ The statements of a vendor after sale cannot be heard to impeach the title of his vendee. A narration of past events forming no part of the transaction under inquiry is not a part of the *res gestæ*, and not admissible on the question of title.²

§ 989. **It must be shown that defendant had possession at the commencement of the action.** The return of the officer showing that he took the property from defendant is sufficient proof of this, and should be offered in evidence if no other proof of that fact is introduced. In replevin the plaintiff is not entitled to recover against the defendant unless it is shown or admitted that defendant had possession at the commencement of the suit.³ In order to maintain replevin in the *detinet* the plaintiff must be prepared to show that the defendant had the possession, either actual or constructive, at the time of the institution of the suit.⁴ No evidence will be admitted to contradict the sheriff's return of *elongatur* after judgment *de retorno habendo* in replevin.⁵

§ 990. **Proof that property was in defendant's possession, how made.** If plaintiff in replevin desire to prove that the property was in defendant's possession, he should introduce the writ and return.⁶ It is proper to admit in evidence the pleadings, writ, and return to show what has become of the property.⁷ A redelivery bond executed by defendant does not prove that the property is in his possession, but the writ and return of the officer is proof that the property was taken from defendant's possession.⁸ Where a defendant

¹ Gullett v. Otey, 19 Bradw. (Ill.) 182.

² Eagle v. Rohrheimer, 21 E. D. Smith (Ill.), 518.

³ Street v. McClerkin, 77 Ala. 580.

⁴ Beebe v. De Baum, 8 Ark. 510.

⁵ Phillips v. Hide, 1 Dall. 439.

⁶ Jetton v. Smead, 29 Ark. 372.

⁷ Bennett v. Schuster, 24 Minn. 383.

⁸ Jetton v. Smead, 29 Ark. 372.

denies that he detained the property, an undertaking given by him to the sheriff for a return of the property is admissible as evidence to go before the jury in disproof of his denial.¹ Where the defendant in his answer denies the claim made by plaintiff and prays a delivery of the property to himself, it is not necessary for the plaintiff to prove that defendant had possession of the property at the commencement of the suit.²

§ 991. **Slight circumstances are sufficient to show possession by defendant** in the absence of a direct issue on this point. Thus, that defendant took the goods as marshal is sufficient proof of the caption under the issue of *non cepit*.³ Proof of detention of property under that issue may be made by any circumstances which go to satisfy a jury that a demand would be unavailing.⁴ Evidence that the defendant obtained possession of the goods from any person not authorized to sell is sufficient evidence of the unlawful taking.⁵

§ 992. **The identity of the property should be shown** so that there can be no question on this point. It is more necessary to do this if it be property difficult to describe. It should be identified with the property of the plaintiff if it be of such a character that a more particular description cannot be given.⁶ In replevin for a yoke of oxen, the identity of the oxen is peculiarly for the jury to determine.⁷ The identity of the property is usually proved by the plaintiff swearing that the property taken is the property claimed, and in the absence of a contest on this point this is sufficient.

§ 993. **Variance.** A declaration in replevin alleging an unlawful caption of a chattel is not supported by proof of

¹ Black v. Foster, 7 Abb. Pr. (N. Y.) 406.

² Flynn v. Jordan, 17 Neb. 518 (23 N. W. 519).

³ DeWolf v. Harris, 4 Mass. 515.

⁴ Cranz v. Kroger, 22 Ill. 74.

⁵ Gray v. Nations, 1 Ark. 557.

⁶ Stanchfield v. Palmer, 4 Green (Iowa), 23.

⁷ Vennum v. Thompson, 38 Ill. 143.

an unlawful detention.¹ Where the plaintiff in replevin describes the property in suit as two bay horses, and the proof shows that one of them was a sorrel, the variance is fatal.² Where property replevied is described differently from that identified by the proof, the jury may properly consider whether or not the description is a mistake, and the property, as a matter of fact, is that of the plaintiff.³ A judgment in replevin for a quantity of stacked wheat, upon which plaintiff had a lien under a chattel mortgage, was reversed because the description of the land on which it grew, as given in the writ of replevin, differed from the description in the chattel mortgage as given in the record, which contained nothing showing that it was incorrect.⁴

§ 994. **Conversion must be shown**, or something equivalent to it, as refusal to deliver after a proper demand. In replevin, either in *cepit* or *detinet*, the issue is the wrongful detention. If there is no proof of this, or something equivalent to it, as demand and refusal, plaintiff's case fails. And where a fact alleged by one party is denied by the other, there is no admission in the pleadings of this fact that can be looked to to help out the proof.⁵ To sustain the action of replevin for wrongfully taking and detaining a personal chattel, it is necessary to show that the defendant wrongfully took it from the actual or constructive possession of the plaintiff. This is elementary law.⁶ Plaintiff in replevin cannot recover unless he shows conversion or a refusal to deliver. Proof of ownership alone is not sufficient.⁷ To

¹ Lothrop v. Locke, 59 N. H. 532.

² Taylor v. Riddle, 35 Ill. 567.

³ Stevens v. Williams, 46 Iowa, 540. In this case, the piano was described by plaintiff as No. 4718. The proof was that the piano was No. 4918, but there was no doubt but the piano replevied was the one which defendant had detained. Nollkamper v. Wyatt, (Neb.) 43 N. W. 357; King v. Conneoy, (Ark.) 12 S. W. 203.

⁴ Coman v. Thompson, 43 Mich. 389 (5 N. W. 452).

⁵ Paul v. Luttrell, 1 Col. 317.

⁶ Simmons v. Jenkins, 76 Ill. 482; Louthain v. Fitzner, 79 Ind. 449; Krug v. Herod, 69 Ind. 78; Latimer v. Wheeler, 3 Abb. Pr. 35.

⁷ Sager v. Blain, 44 N. Y. 445; Packard v. Getman, 4 Wend. 613;

sustain the action of replevin for wrongfully taking and detaining a personal chattel, it is necessary to show that the defendant wrongfully took it from the actual or constructive possession of the plaintiff. This is elementary law.¹ It is necessary for the plaintiff to prove either an unlawful taking or an unlawful detainer.²

§ 995. **In replevin, the question of value is not in issue** only as it comes in incidentally to the main issues, which are the title and right of possession.³ And the rulings as to the admissibility of evidence of value is governed by the particular facts of each case, and the trial judge should exercise care.

§ 996. **On the subject of value** the affidavit in replevin is competent but not conclusive evidence against the plaintiff.⁴ Where the property will diminish in value by lapse of time, the plaintiff ought to be willing to be bound by the value stated by him at the time he took it.⁵ In some states the plaintiff is concluded from showing a different value than that fixed by him in his affidavit, but of course such valuation does not affect the defendant's rights in any way.⁶ The appraisement made at the time of levying a distress is *prima facie* evidence of the value of the goods distrained.⁷

§ 997. **The appraisement is not conclusive of value.** It was made for a specific purpose—as a guide to gauge the amount of the bond—and having served that purpose, like the affidavit, is of no further use in the case, and the value thus fixed is not binding on either party, but a different

¹ *Simmons v. Jenkins*, 76 Ill. 479.

² *Baer v. Martin*, 2 Ind. 229; *Cummings v. McGill*, 2 Tayl. (N. C.) 98.

³ *Thomas v. Spofford*, 46 Me. 408.

⁴ *Lamy v. Remuson*, 2 N. M. 245.

⁵ *Howe v. Handley*, 28 Me. 251; *Swift v. Barnes*, 16 Pick. 194; *Parker v. Simonds*, 8 Met. 205.

⁶ *Gray v. Jones*, 1 Head. 544; *Tuck v. Moses*, 58 Me. 477; *Swift v. Barnes*, 16 Pick. 196; *Huggeford v. Ford*, 11 Pick. 225; *Middleton v. Bryan*, 3 Maul. & S. 155; *Parker v. Simonds*, 8 Met. 205; *Clap v. Guild*, 8 Mass. 153; *Washington Ice Co. v. Webster*, 62 Me. 341.

⁷ *Semmes v. Spreng*, 4 Cranch (C. Ct.), 292.

value may be shown by either.¹ The appraisal in a replevin suit is *prima facie* evidence of the value of the property, but to have that effect it must be offered in evidence.²

§ 998. **Value may be shown, though no question is raised thereon.** The plaintiff in replevin may show the value of the property, though no issue is raised on that point by the pleadings.³ Failure of the answer to deny the value alleged in the petition is not an admission of that value, but leaves it an open question, to be determined from the evidence,⁴ and the plaintiff should always give some evidence of the value on the trial.

§ 999. **Though a contrary rule has been followed,** evidence should not be admitted in replevin as to the value of the property if the answer does not deny the allegation of the complaint thereon.⁵ The affidavit for sequestration stated the value of the property, as also did the defendant's bond for replevying it, but it was *held*, in the absence of an allegation of the value in the plaintiff's petition for the recovery of the property, it was error to admit evidence of value against objection of defendant.⁶ The better and safer rule is to prove the value on the trial, whether denied or not.

§ 1000. **Value—How shown.** In an action to recover canal boats, evidence of their value a year previous to conversion is admissible when supplemented by evidence that they were in the same condition when converted.⁷ What a person paid for horses fifteen months before the trial is no evidence of their value on day of trial.⁸ Evidence showing the value of a cow one year before an action is brought is

¹ *Kofer v. Harlow*, 5 Allen, 348; *Leighton v. Brown*, 98 Mass. 515; *Wright v. Quirk*, 105 Mass. 48.

² *Williams v. Bresnahan*, 66 Mich. 634 (33 N. W. 739).

³ *Jenkins v. Stanka*, 19 Wis. 126.

⁴ *Chicago, &c., v. Northwestern, &c.*, 38 Iowa, 377.

⁵ *Tully v. Harloe*, 35 Cal. 302.

⁶ *Gillies v. Wofford*, 26 Texas, 76.

⁷ *Brewster v. Silliman*, 38 N. Y. 423.

⁸ *Ascher v. Schaeper*, 25 Mo. App. 1. See *Minthon v. Lewis*, (Ia.) 43 N. W. 465.

admissible, and evidence tending to show the interest and credibility of a party to the suit is admissible.¹ In order to recover a judgment for the value of the property detained, the plaintiff need not show the value of each article, but it is enough to show the total value.² In replevin against a constable for goods, the defendant may show their market value by testimony that he had sold them publicly after full notice to those who would be likely to become bidders, and that they brought only certain sums.³ Where the affidavit, writ, and declaration in replevin before a justice of the peace set forth the value of the property at less than \$100, and the proof shows it to be more, this does not oust the justice of jurisdiction.⁴

§ 1001. **Evidence under a general denial.** A general denial in replevin throws upon plaintiff the burden of proving his title and right of possession and detention by defendant.⁵ A general denial by defendant, even if followed by a claim of title in defendant, will not relieve plaintiff from showing that he was entitled to possession of the property, and that defendant had the possession, in fact, at the commencement of the suit.⁶ In an action for the recovery of specific personal property, it is necessary for the plaintiff to show that he is entitled to the immediate possession.⁷ In an action of replevin, any fact which tends directly to disprove right of possession in the plaintiff may be shown under a general denial. Fraud in the acquisition of plaintiff's title may be proved by the defendant under a general denial.⁸ In an action of replevin, the burden of proof is upon the plaintiff to

¹ *Denton v. Smith*, 61 Mich. 431 (28 N. W. 160); *Minthon v. Lewis*, (Ia.) 43 N. W. 465.

² *Goldsmith v. Wilson*, 67 Iowa, 662 (25 N. W. 870).

³ *Jennings v. Prentice*, 39 Mich. 421.

⁴ *Henderson v. Desborough*, 28 Mich. 170.

⁵ *Wilson v. Fuller*, 9 Kan. 176.

⁶ *Wheeler & W. Mfg. Co. v. Teetzlaff*, 53 Wis. 211 (10 N. W. 155).

⁷ *Hilger v. Edwards*, 5 Nev. 85.

⁸ *Stern, A. & C. Co. v. Mason*, 16 Mo. App. 473; *Young v. Glasscock*, 79 Mo. 575; *Shulenburg v. Harriman*, 2 Wall. 58; *Caldwell v. Bruggeman*, 4 Wis. 276.

show title in himself. He cannot recover because of any weakness or defect in the title of defendant.¹ On the trial of the issue of property or not in the plaintiff, it is not necessary for him to prove that the defendant took the property out of his possession.² In Michigan a declaration is supported as well by proof of an unlawful taking as an unlawful detention.³ Where replevin is in the *cepit*, it is proper to prove damages from the taking.⁴ Where there is an avowry for rent, the time at which the rent was payable and the amount must be proved as laid.⁵

§ 1002. **Issue in replevin evidence under general denial.** In an action of replevin, the defendant, under a "general denial," will be entitled to prove that he does not wrongfully detain the property by proving that his detention was rightful.⁶ In replevin, under a general denial, the plaintiff is bound to prove his title and right of possession to the property.⁷ Where the plaintiff claimed possession and ownership, and defendant denied generally, defendant was allowed to show right of possession by virtue of a lien without specially pleading the same.⁸ The question in replevin is whether the property in controversy belongs to the plaintiffs, and hence, in an action of replevin for grain in warehouses, levied upon as the property of defendants, there is no objection to the defendants being permitted to prove that there was grain in both warehouses belonging to other parties.⁹ In Indiana the defendant may prove property in

¹ *Hamilton v. The Iowa Bank*, 40 Iowa, 307; *Sensenbrenner v. Matthews*, 48 Wis. 250 (3 N. W. 599).

² *Kerley v. Hume*, 3 T. B. Mon. (Ky.) 181.

³ *Trudo v. Anderson*, 10 Mich. 357.

⁴ *Town v. Wilson*, 8 Ark. 464.

⁵ *Waltman v. Alison*, 10 Pa. St. 464.

⁶ *Yandle v. Crane*, 13 Kan. 344. See on this subject also *Town of Leroy v. McConnell*, 8 Kan. 273; *Wilson v. Fuller*, 9 Kan. 177-190.

⁷ *Eavanagh v. Phelps*, 36 Conn. 111.

⁸ *Lindsey v. Wyatt*, 1 Idaho, 738.

⁹ *Nelson v. McIntyre*, 1 Bradw. (Ill.) 603.

himself or a stranger without pleading it.¹ Under the general issue the defendant may prove that the plaintiff is not entitled to the property, or that the title under which plaintiff claims is void.² In replevin for carrying away grain, defendant may show that the title is in himself.³ The plaintiff in replevin cannot recover unless he shows title in himself, and the defendant may defeat the action by showing title in a third person without connecting himself with that person.⁴ On the issue of "no rent in arrears," the title of the plaintiff does not come in question.⁵

§ 1003. **The same—Illustrations.** Under a general allegation in the complaint, in an action of replevin, of ownership in the plaintiff, and a denial thereof in the answer, accompanied with an allegation of ownership in a third party, and a seizure of the property by the defendant (an officer), on execution against such third party, the defendant may introduce testimony to show that a voluntary transfer by the execution debtor to the plaintiff was fraudulent and void as to creditors, and the plaintiff may show in rebuttal that the property was exempt from execution at the time of such transfer.⁶ Where replevin is brought for an egg wagon, plaintiff claims that he ordered it made, and that defendant sued him in another action and recovered judgment for its price, which has been paid, and the defense is that it was tendered and refused as not properly made, and general denial. It is proper to admit all the facts in evidence which throw light upon the transaction of

¹ *Lewis v. Masters*, 6 Blackf. (Ind.) 243. See *Kennett v. Fickel* (Kan.), 21 P. 93.

² *Gibson v. Mozier*, 9 Mo. 256.

³ *Elliott v. Powell*, 10 Watts (Pa.), 453.

⁴ *Brown v. Chicopee, &c.*, 16 Conn. 87; *Lester v. McDowell*, 18 Pa. St. 91; *Redman v. Hendrickson*, 1 Sandf. (N. Y.) 32; *Howland v. Fuller*, 8 Minn. 50; *Simcoke v. Frederick*, 1 Ind. 54; *Tomlinson v. Collins*, 2^d Conn. 364; *Robinson v. Calloway*, 4 Ark. 94.

⁵ *Williams v. Smith*, 10 Serg. & R. (Pa.) 203.

⁶ *Furman v. Tenny*, 28 Minn. 77 (9 N. W. 172).

the order, tender, and first suit.¹ A defendant filing a cognizance and justifying the taking charged is bound to prove the matter of justification as alleged.² The statutes and rules of courts differ some as to what issues are raised by a general denial, and of course they would differ as to what proof was admissible under the general denial; but the general rule is that by a general denial the burden is thrown upon plaintiff, and he must prove all the averments of his affidavit which are necessary to show that he had a better right to possession than some one else, but not the averments necessary to show that the property was repleviable, as that it was not taken for a tax, fine, etc. No issue is made on these points by a general denial.

§ 1004. **Evidence admissible under non-detinet.** In replevin, under the plea of *non-detinet*, the defendant may show that he held the goods by virtue of certain executions, without special plea.³ In replevin in the *detinet*, the proof of refusal need not be as strong as in trover,⁴ but about the same proof is required on other points as in trover.⁵

§ 1005. **Evidence under plea of property in defendant.** In replevin, where the defendant pleads property in himself, the burden of proof is upon the plaintiff to show title to the property or his right to possession, and defendant has a right, under such plea, to show by what means he came into possession of the property, and his title thereto.⁶ Under a claim of title in defendant, the *onus* is on plaintiff to establish his title and right to possession of the property.⁷ A plea of property in defendant or in a stranger casts the burden upon the plaintiff of proving, by a preponderance of

¹ Lyman v. Becannon, 29 Mich. 466.

² Hobbs v. Meyers, 1 B. Mon. (Ky.) 241.

³ Oaks v. Wyatt, 10 Ohio, 344.

⁴ Holbrook v. Wight, 24 Wend. (N. Y.) 169.

⁵ Ingalls v. Bulkley, 13 Ill. 315. See Pringle v. Phillips, 5 Sandf. (N. Y.) 157.

⁶ McFarlan v. McClellan, 3 Bradw. (Ill.) 295.

⁷ Morgner v. Beggs, 46 Mo. 65.

evidence, property in himself.¹ Evidence of a forcible taking may be given, though the issue be on a plea of property.² Upon a plea of property in the defendant, the burden of proof is thrown upon the plaintiff.³ If defendant in replevin plead property in himself, the burden of proof is upon plaintiff to show a right of action in himself.⁴ Where the defendant pleads *non-cepit*, the plaintiff is bound to prove the wrongful taking.⁵ Where *non-cepit* is pleaded, with a brief statement alleging the property in the articles replevied to be in the defendant, the plaintiff, after proving the taking, is not bound to prove property in himself, but it is incumbent on the defendant to show that he is the owner thereof.⁶

§ 1006. Where the question is one of title, plaintiff must show both title and right to possession. In order to maintain his action, the plaintiff in replevin, where the issue raises the question of title, must show both property in the goods taken and the right of immediate and exclusive possession. If he fail to establish the right of possession, he fails to establish his title as against the defendant as much as if he failed to prove his general or special ownership, and, from the nature of the case, the verdict in his favor must leave the ownership unsettled. A return of the property as a general rule follows of course. If the defendant be not the true owner, he may still be accountable over for it to such owner. And the burden is on the plaintiff to show sufficient reason for refusing the order for a return. This he may do by showing that the title of the defendant or his right of possession has terminated since the

¹ *Martin v. Wirts*, 11 Bradw. (Ill.) 567.

² *Moore v. Shenk*, 3 Pa. St. 13.

³ *Harwood v. Smethurst*, 29 N. J. L. (5 Dutch.) 195; *Hunt v. Chambers*, 21 N. J. L. (1 Zab.) 620; *Turner v. Cool*, 23 Ind. 56; *Anderson v. Talecott*, 6 Ill. (1 Gilm.) 365; *Pennington v. Chandler*, 5 Harr. (Del.) 394; *Williamson v. Ringgold*, 4 Cranch, C. Ct. 39.

⁴ *Hill v. Fellows*, 25 Ark. 11.

⁵ *Town v. Evans*, 6 Ark. 260.

⁶ *Green v. Dingley*, 24 Me. 131; *Sawyer v. Huff*, 25 Me. 464.

commencement of the suit, or that the property has in fact gone to the possession of the true owner.¹ On a plea which puts plaintiff to proof of property in himself, any evidence which tends to show the plaintiff is not the owner is legitimate, and it is error to reject it upon the trial of the issue so made. Where plaintiff's claim of ownership is traversed, he must make title against the world.² In the action of replevin, where the plaintiff's pleading is a general averment of ownership, any proof on the part of the defendant which goes to show that the plaintiff, at the time of the institution of the suit, was not the actual owner, and was not entitled to the possession thereof, is admissible under the general issue, even though it extend to proof of fraud in the acquisition of plaintiff's title, or that the ownership and right of possession were in a third person.³ Where, in an action of replevin, the complaint alleges property and right of possession in the plaintiffs, and the answer traverses directly these allegations, under the issue thus formed any evidence is admissible on the part of the defendant which goes to show that the plaintiffs have neither property nor right of possession. Evidence of title in a stranger is admissible.⁴ Where the issues raise the question of title, it devolves upon plaintiff to prove property in the goods at the time of their caption, and the right to immediate and exclusive possession. If this is not done, and the evidence shows that they have been taken from defendant by plaintiff, there

¹ *Barry v. O'Brien*, 103 Mass. 520; *Dawson v. Wetherbee*, 2 Allen, 461; *Johnson v. Neale*, 6 Allen, 227; *Collins v. Evans*, 15 Pick. 63; *Simpson v. McFarland*, 18 Pick. 427.

² *Prosser v. Woodward*, 21 Wend. 205; *Johnson v. Neale*, 6 Allen, 229; *Seibert v. McHenry*, 6 Watt. 303; *Cullom v. Beavin*, 6 Harr. & J. 469; *Constantine v. Foster*, 57 Ill. 36; *Anderson v. Talcott*, 1 Gilm. 371; *Gotloff v. Henry*, 14 Ill. 384; *Hunt v. Chambers*, 1 Zab. 627; *Rogers v. Arnold*, 12 Wend. 30; *Noble v. Epperly*, 6 Ind. 414.

³ *Young v. Glasscock*, 79 Mo. 574; *Schulenberg v. Harriman*, 21 Wall. 45; *Mather v. Hutchinson*, 25 Wis. 27-36; *Caldwell v. Bruggerman*, 4 Minn. 270; *Wheeler v. Billings*, 38 N. Y. 264; *Bosse v. Thomas*, 3 Mo. App. 472; *Pomeroy's Rem. & Rem. Rights*, § 671.

⁴ *Schulenberg v. Harriman*, 21 Wallace (U. S. S. C.), 44.

should be a judgment for their return, though the pleading may not set up title in defendant or claim a return.¹

§ 1007. The writ of attachment under which an officer justifies is proper evidence for him to show his authority, and makes a *prima facie* case in his favor. The defense of justification must always be established by the pleader affirmatively,² unless it is alleged merely as an inducement to the denial of plaintiff's claim. Where a defendant in replevin justifies as an officer under a writ of attachment, if the writ is fair on its face and issued in an action where it is allowed by law, the writ should be admitted in evidence as a *prima facie* justification.³ Where the sheriff, defendant in replevin, justifies under a writ of attachment against the plaintiff in replevin, the proceedings in the attachment proceedings are competent evidence for the sheriff.⁴ Where an officer defends under a writ, it is incumbent upon him to introduce or prove the writ, to show his right to possession and the value thereof.⁵ Parol evidence of an attachment without the writ or record is insufficient to establish that the property was in the custody of the law and not subject to replevin.⁶ In replevin against a sheriff who justifies under a writ of attachment, he should be allowed to introduce his writ of attachment and the affidavit in the attachment proceeding irrespective of any question as to the validity of the sale upon which title is based, and such showing makes a *prima facie* case of justification, even though the affidavit was originally insufficient, and was amended after the seizure.⁷

¹ Bosse v. Thomas, 3 Mo. App. 472; Gray v. Parker, 38 Mo. 160; Connor v. Comstock, 17 Ind. 90.

² Hobbs v. Meyers, 1 B. M. 242.

³ Brichman v. Ross, 67 Cal. 601 (8 P. 316). See Willis v. Reinhardt, (Ark.) 12 S. W. 241.

⁴ McBray v. Dillard, 49 Ala. 174. See Smith v. Jensen, (Col.) 22 P. 434.

⁵ Williams v. Eikenberry, 22 Neb. 211 (34 N. W. 373).

⁶ Van Baalen v. Dean, 27 Mich. 104.

⁷ Babe v. Coyne, 53 Cal. 261.

§ 1008. **An officer must prove his official character.** Where an officer justifies the taking of property by virtue of an execution, he must prove himself an officer *de jure*.¹ To sustain a judgment in replevin in favor of an officer who claims the right of possession by virtue of a seizure in an attachment action, the proof should show his official character and the proceedings and process under which he acted and claims possession.² This he can do by swearing that he was an officer at the time he acted as such, which is sufficient in the absence of proof to the contrary.

§ 1009. **Service on the attachment defendant must be shown to conclude him or those holding under him.** Where M. replevies property of R., who justifies his possession by pleading that he holds it as sheriff, under an attachment and judgment, the record of such judgment should be rejected as evidence for the defendant below, it failing to show that the defendant in attachment was properly served with process.³ In replevin against an officer who has attached the property on a writ against a stranger, proof that plaintiff was in possession, claiming the property as his own, at the time of the seizure, is sufficient to maintain the action in the absence of any evidence that the stranger (attachment defendant) had any interest in the property.⁴ But where an officer attaches property in the hands of a stranger to his writ who claims title, in replevin by the stranger the officer must go further and prove not only his writ, but the indebtedness and the regularity of all the proceedings.⁵

§ 1010. **What may be shown where defense is title**

¹ Gilligan v. Stevens, 4 Bradw. (Ill.) 401; Outhouse v. Allen, 72 Ill. 529; Schlencker v. Risley, 3 Scam. 484. That he was an acting constable is insufficient. Vaughn v. Owens, 21 Ill. App. 249.

² Graham v. Shaw, 38 Kan. 734 (17 P. 332); Arn v. Parker, 39 Kan. 338 (18 P. 201).

³ Repine v. McPherson, 2 Kan. 340.

⁴ Wambold v. Vick, 50 Wis. 456 (7 N. W. 438).

⁵ Williams v. Eikenberry, 25 Neb. 721 (41 N. W. 770); Oberfelder v. Kavanaugh, 21 Neb. 483; Thornburg v. Hand, 7 Cal. 554.

under a writ—Illustrations. Where a defendant justifies under a writ of attachment against the mortgagor's property, he must not merely prove his writ, but show that the attachment plaintiff was in fact a creditor of the mortgagor. The question whether the mortgage is fraudulent and void as to creditors is immaterial until defendant has shown that he represents creditors.¹ Where a purchaser at a constable's sale has to bring replevin to get possession of his purchase, he must show the judgment and execution on which they were sold, and that he bought them, but he need not show the regularity of the levy of the execution, as that cannot be inquired into collaterally.² In replevin by a mortgagee against an attachment creditor, in the absence of fraud or collusion the issues naturally raised in the attachment suit cannot be retried in the replevin suit, and the return of the officer to the attachment writ is conclusive as to what he did under it.³ An attachment was levied upon chattels sold by an insolvent debtor, and the purchaser brought replevin therefore against the sheriff. *Held*, that the judgment in the attachment suit was admissible in the suit in replevin to show the extent of defendant's lien in order that his special interest might be assessed if he recovered judgment.⁴ An assignee of goods, bringing replevin against a constable who had levied on them under an execution against the assignor, may be cross-examined as to whether or not he was wholly irresponsible, the purpose being to show that the assignment was a fraud upon creditors. But the question as to whether or not the constable who levied the attachment was indemnified or not is irrelevant.⁵

§ 1011. **The same.** In an action of replevin against a

¹ *James v. Van Duyn*, 45 Wis. 512; *Bogart v. Phelps*, 14 Id. 88; *Remington v. Bailey*, 13 Id. 332.

² *Boyce v. Cannon*, 5 *Houst.* (Del.) 409.

³ *Wallen v. Rossman*, 45 Mich. 333 (7 N. W. 901).

⁴ *Berger v. Clippert*, 53 Mich. 468 (19 N. W. 149).

⁵ *Jennings v. Prentice*, 39 Mich. 421; *Angell v. Rosenbury*, 12 Mich. 241; *Smith v. Mitchell*, Id. 180.

sheriff to recover possession of certain lumber held by him by virtue of an attachment against a third person, where the plaintiff claims title by purchase from the attachment debtor, and it appears that the purchase was by written contract, and the question in dispute is whether the sale had been completed before the levy of the attachment, the provisions of this contract become important, and evidence of the contract should be admitted.¹ Where an attachment debtor had, to get an attached tug released, turned out other property which was finally sold, and the debtor brought replevin against the purchasers of this property, *held*, proper to show all the facts in regard to the change of property levied on upon a plea by defendants that plaintiff was estopped to claim the property in replevin.² To question the validity of an assignment under which plaintiff was in possession defendant must show that he represented a creditor of plaintiff and acted by virtue of legal process; otherwise, he is a mere trespasser.³ In contest between one claiming as owner, and an officer holding on execution against a third person, the validity of a chattel mortgage on the property is not in issue, and evidence in regard to it is inadmissible.⁴

§ 1012. **As to matters occurring after suit.** In replevin against a constable who holds the goods in controversy, as the property of a third person under a writ of attachment, evidence is not admissible on behalf of the plaintiff to show that the attachment was dissolved after the replevin was brought.⁵ If a change of ownership, or a change in the legal right of possession, took place after suit brought, and before trial, such fact may materially affect the verdict and judgment. But it should be properly presented at the trial, and where there is neither averment in the pleadings nor evidence tending to show any such change, the presumption

¹ Hatch v. Fowler, 28 Mich. 205.

² Payment v. Church, 38 Mich. 776.

³ McCout v. Bond, 64 Wis. 596 (25 N. W. 532).

⁴ Smith v. Mohler, 24 Ill. App. 407.

⁵ McCraw v. Welch, 2 Col. 284.

is that the title or right to possession has undergone no alteration since the suit was commenced.¹ The question being whether the plaintiff's title was real or only colorable, evidence is admissible that the plaintiff paid for the goods, although the payment was after action brought. Or the plaintiff may show that he assumed liabilities of such a character as might be naturally expected of a *bona fide* holder.²

§ 1013. **Rule of evidence where the foundation of title is an execution.** To protect a constable holding under execution, he must show a valid judgment. The rule that an officer is protected by his process, if it is fair on its face, merely protects him when proceeded against as a wrongdoer, but confers upon him no right of property.³ In replevin against a constable claiming under a levy of execution, the defendant can recover the amount of his lien only on proof of a valid judgment and execution. Proof of an execution alone, even though valid on its face, is not enough.⁴ A plaintiff in replevin who claims by reason of a purchase at an execution sale must prove the execution and judgment leading up to that sale.⁵ Where goods taken upon execution are replevied by a person claiming to be the owner thereof, the plaintiff in the replevin suit has a right to go to the jury upon the question as to the actual possession of the goods at the time of the levy.⁶ The former owner of the goods replevied cannot prove that he had sold them to the plaintiff, and that they had subsequently been sold under execution upon judgment of a third person, and purchased by defendant.⁷ A party in replevin justifying under execu-

¹ *Hammond v. Solliday*, 8 Col. 610 (9 P. 781); *Leonard v. Whitney*, 109 Mass. 265; *Cole, Admr. v. Conoly*, 16 Ala. 271, and cases cited. See *Ator v. Rix*, 21 Ill. App. 309.

² *Hosmer v. Moseley*, 11 Cush. (Mass.) 211.

³ *Beach v. Botsford*, 1 Dougl. (Mich.) 199.

⁴ *Andrews v. Smith*, 41 Mich. 683.

⁵ *Sandford v. Hess*, 2 Head. (Tenn.) 680.

⁶ *Merritt v. Lyon*, 3 Barb. (N. Y.) 110.

⁷ *Green v. Thomas*, 7 Harr. & J. (Md.) 458.

tion process must show the judgment, execution, and levy.¹ A sheriff who claims a return of the goods and defends under a civil process must show a good title *in omnibus*, and must show a foundation for the writ.² The plaintiff, in proving property, may use an execution in which he is defendant, and under which the property was delivered to him on a forthcoming bond, without producing the judgment.³ Where the sheriff had levied upon certain personal property as the property of the one in whose possession it was found, and the plaintiff in replevin sought to recover on the strength of a purchase before the levy, the burden is on him to prove such purchase and notice of his claim to the sheriff or judgment creditor.⁴ Where the plaintiff in replevin claims under a purchase made prior to the levy of execution by an officer, the officer may show that such purchase was fraudulent.⁵ The rule is that where a seizure or sale under an execution is relied upon as a source of title, the party basing his title thereon must show a valid judgment and regular proceedings, as well as an execution.

§ 1014. Where fraud is the issue, considerable latitude in the proof should be allowed, and any matter which will throw light upon the *bona fides* of the transaction upon which either party bases his title should be examined into, that the court and jury may act understandingly.⁶ The question of fraudulent transfer of personal property is one of fact for the jury. A witness in replevin may properly testify that a particular person was "in possession" of the property at a certain time, and it is for the adverse party by cross-examination to find out what facts he based his testimony on.⁷

¹ *Truitt v. Revitt*, 4 Harr. (Del.) 71.

² *Brown v. Bissett*, 21 N. J. L. (1 Zab.) 46.

³ *Lynch v. Welsh*, 3 Pa. St. 294.

⁴ *West v. St. John*, 63 Iowa, 287 (19 N. W. 238).

⁵ *Stephens v. Frazier*, 2 B. Mon. (Ky.) 250.

⁶ *Blake v. Groves*, 18 Iowa, 314; *Cannon v. White*, 16 La. Ann. 88; *McNorton v. Akers*, 24 Iowa, 369.

⁷ *Trowbridge v. Sickler*, 54 Wis. 306 (11 N. W. 581).

Evidence tending to show the performance in good faith of the contract of the conveyance under which plaintiff in replevin claims, by the grantee, is admissible to show the *bona fide* character of the conveyance when called in question by the defendant.¹ In replevin of goods on the ground that they were obtained by the defendant from the plaintiff by fraud, evidence of other similar frauds practised by the defendant upon third persons, about the same time, is competent evidence.² In an action to recover personal property, where the defense was that plaintiff's title was fraudulent, before the burden of proof was cast upon defendant it is necessary for plaintiff to show title in himself.³ In an action of replevin against the assignee of an insolvent debtor, to recover property claimed to have been obtained by the debtor through a fraudulent purchase procured by false representations as to his financial condition, evidence is admissible of other similar purchases made about the same time.⁴ Where the defendant in replevin, an officer, answers property in D., the execution defendant, levy, etc., evidence to prove a sham sale from D. to plaintiff in replevin, *held*, admissible. Defendants are not bound to disclose by special plea the ground of their attack.⁵ Where a plaintiff, in a replevin suit for goods attached on a debt of her vendor, assigned as error the exclusion of testimony offered to show loss of profits by reason of such attachment, but the jury found the sale under which she claimed *fraudulent*: *Held*, that the proposed testimony only affected the *extent* of her recovery, and the jury having found that she had no cause

¹ Wilson v. Hillhouse, 14 Iowa, 199.

² Wiggins v. Day, 9 Gray (Mass.), 97.

³ Hardy v. Moore, 62 Iowa, 65 (17 N. W. 200).

⁴ Bradley v. Fuller, 58 Vt. 315 (2 A. 162). See Best Ev. 487, note 1; 1 Greenl. Ev., § 53; Pierce v. Hoffman, 24 Vt. 525; Eastman v. Premo, 49 Vt. 355.

⁵ Seeman v. Allard, 15 Bradw. (Ill.) 568; Strohm v. Hayes, 70 Ill. 41.

of action, its exclusion even if erroneous was error without prejudice.¹

§ 1015. **The burden is on the pleader of fraud to prove it.** The law will not presume fraud where plaintiff traded property for a mortgage and some money, and tenders back the money and mortgage, and brings replevin for his property; the burden is on him to prove the fraud upon which he relies to avoid the sale.²

§ 1016. **Need not be definite as to place of detention.** It is not necessary that the place where the property is detained be proved by direct evidence, but it may be inferred from circumstances.³ The declaration in replevin stated the taking to be in Gay Street, from the dwelling of plaintiff. *Held*, that evidence of a taking in Gay Street was sufficient without proving that he took it from the dwelling house.⁴ Where the plaintiff in replevin charged detention in one county, and defendants justified, plaintiff was allowed to prove the taking in another county, under an attachment.⁵ An action to recover specific personal property, brought in the county where the defendant resides, will not be defeated simply because the plaintiff failed to prove that the property is detained in the county.⁶ But as a guide to the sheriff in finding and identifying the property, it should be stated clearly where possible.

§ 1017. **Possession of personal property is prima facie proof of ownership**, and is presumptive evidence that the possession is rightful. Possession indeed may be considered the primitive proof of title and the natural foundation of right. In the action of replevin, therefore, it devolves upon the plaintiff to prove that at the time of the caption he had the general or special property in the goods taken, and the

¹ Manning v. Bresnahan, 63 Mich. 584 (30 N. W. 189).

² Bristol v. Braidwood, 28 Mich. 191.

³ Louthain v. May, 77 Ind. 109.

⁴ Faget v. Brayton, 2 Harr. & J. (Md.) 350.

⁵ Craig v. Grant, 6 Mich. 447.

⁶ Goldsmith v. Wilson, 67 Iowa, 662 (25 N. W. 870).

right of immediate and exclusive possession. The gist of the actions is the wrongful detention, and not the original taking.¹ In replevin for the unlawful taking of a horse the plaintiff showed that he bought and took possession of him in August, and that in September the defendant removed him to the stable of a third person to be kept; *Held*, that this was *prima facie* a tortious taking.² Possession of personal property is not title, but is *prima facie* evidence of title. In an action of replevin by the conditional vendor against a *bona fide* purchaser from his vendee in possession, the burden is on the plaintiff to show the condition of the sale, and that it has not been complied with, so that his right to possession has accrued.³ Where the question turns largely upon possession at a certain time, a witness who testifies that on a certain day he was in possession as agent of one of the parties, it is proper to cross-examine him as to whose employ he was in at and prior to that time, and other facts connected therewith.⁴

§ 1018. **Right of possession proved by proof of ownership.** An allegation of right of possession is proved by evidence of ownership of the property where no special right of possession is shown by the opposite party.⁵ In action of replevin for a horse, which the defendant claimed to have become possessed of by barter with the plaintiff, the burden of proof was held to be upon the latter to establish his ownership, and not upon the former to first prove the contract of sale or barter.⁶

¹ Phillips v. Scholl, 21 Mo. App. 38; 1 Green. Ev., § 34; 2 Id., § 561; Magee v. Scott, 9 Cush. 150; Milling v. Butts, 35 Me. 139; Linscott v. Trask, 35 Me. 151; Milton v. McDaniel, 2 Mo. 45; Pilkington v. Trigg, 28 Mo. 95; Morguer v. Biggs, 46 Mo. 66; Gray v. Parker, 38 Mo. 165.

² Morris v. Danielson, 3 Hill (N. Y.), 168.

³ Ketchum v. Brennan, 53 Miss. 596.

⁴ Blake v. Powell, 26 Kan. 320; Thornburg v. Hand, 7 Cal. 554. See also Coates v. Hopkins, 34 Mo. 135; D. & M. R. Co. v. Von Steinburg, 17 Mich. 109; Haynes v. Ledyard, 33 Mich. 319; Ferguson v. Rutherford, 7 Nev. 385; Lamphrey v. Munch, 21 Minn. 379.

⁵ Cassell v. Western, 12 Iowa, 47.

⁶ Peake v. Conlan, 43 Iowa, 297.

§ 1019. Illustrations of proper evidence in cases depending upon particular facts. For lumber drifted upon the land of another, to maintain replevin it is not necessary for plaintiff to prove that defendant did not suffer damage. It is sufficient for him to show that the lumber is his, that it is in the possession of defendant, and that the latter has refused to deliver it on demand.¹ In an action of replevin for property held under a chattel mortgage by the agent of the assignee of the mortgage, the writing witnessing the contract of assignment is competent evidence.² Where plaintiff in replevin claimed defendant had taken his horse without leave, and defendant claimed a trade, it is proper to ask plaintiff what he did with the horse after he replevied it, and also to ask defendant what he did with the horse before he was replevied, whether or not he had secreted him.³ Where, in an action for the possession of personal property, the plaintiff makes proof of a chattel mortgage to him, valid on its face, the possession of the property by the mortgagor, the record of the mortgage, and the maturity of the debt the mortgage was given to secure, he makes out a *prima facie* case, and it is error for the court to direct a verdict for the defendant.⁴ Where the only evidence is that of defendant, that he turned over all of the property claimed that he had after the suit was brought, the plaintiff is entitled to judgment for possession and for nominal damages.⁵ Where the defendant in replevin had purchased the property in good faith and improved it, he may show the amount of his expenditure for the purpose of proving his damages.⁶ In replevin for a horse, the defendant pleaded in bar that the horse was the property of one T., and not of the plaintiff, and issue was joined on the plaintiff's property, *held*,

¹ *Flanders v. Locke*, 53 Cal. 21.

² *Olson v. Martin*, 38 Iowa, 346.

³ *English v. Caldwell*, 30 Mich. 362.

⁴ *Turner v. Langdon*, 85 Mo. 438.

⁵ *Cordwill v. Gilmore*, 86 Ind. 428; *Chessom v. Lamcool*, 9 Ind. 530.

⁶ *Veazie v. Somerby*, 5 Allen (Mass.), 280.

that evidence offered by the defendant, upon the issue joined, that the horse was the property of the son of the plaintiff, was admissible because it tended to disprove the plaintiff's title, though plaintiff made no claim under the son.¹

§ 1020. **The same.** In Iowa, though nonsuited, the plaintiff in replevin may still offer testimony to prove ownership of the property in himself, upon the inquiry into the right of defendant's possession, in order to show that defendant could have sustained no substantial damage, as he was not the owner of the property.² An offer by the plaintiff to prove that the defendant has taken the benefit of the insolvent laws of the state will be rejected as irrelevant.³ Evidence showing the intention of the defendant in taking and appropriating property is immaterial; his liability does not depend on his intention.⁴ The question of possession is the only one to be inquired into; the court cannot consider an unexecuted agreement for a change of possession.⁵ Where, in an action of replevin, the plaintiff alleged that the defendant claimed the property under a pretended contract of exchange, which did not in fact exist, it was *held* that under such allegation evidence was admissible to show that the contract was void for fraud.⁶ In an action of replevin brought for a piano by one claiming under the vendee against the vendor's agent who had taken possession, *held*, that a contract of sale which provided that the title should remain in the vendor until full payment, and that in case of default he might declare the contract void and take possession, does not give the vendor right to possession until he has declared the contract of sale terminated.⁷ Rulings in regard to sufficiency and nature of proof in cases depending upon particular facts.⁸

¹ Brown v. Webster, 4 N. H. 500.

² Harmon v. Goodrich, 1 Greene (Iowa), 13.

³ Bosford v. Mills, 6 Md. 385.

⁴ Ecker v. Moore, 2 Chand. (Wis.) 85.

⁵ Wilson v. Reese, 37 Ga. 578.

⁶ Nolon v. Jones, 53 Iowa, 387 (5 N. W. 572).

⁷ Giddey v. Altman, 27 Mich. 206.

⁸ Drake v. Wakefield, 11 How. Pr. (N. Y.) 106; Adams v. Adams, 13

§ 1021. **Illustrations of matters held too remote from the main issue.** In replevin by the owner of a mare to recover her from a person who had taken her from a thief and detained her until a reward, which had been offered for her recovery should be paid, a telegram from a third party, an officer, to the owner that he had the mare, was held inadmissible.¹ Evidence of good character and reputation for honesty and fair dealing is not admissible upon the part of a plaintiff, claiming possession as a mortgagee of personal property under a chattel mortgage, in an action of replevin brought by him against an officer to recover the possession of the property levied upon in an attachment against the mortgagor, when the mortgage is assailed as fraudulent as against the creditors of the mortgagor.² Upon the issue of no rent in arrear, the plaintiff in replevin will not be permitted to show that the defendant had nothing in the tenements.³

§ 1022. **Proper evidence in replevin of exempt property.** In replevin for exempt property, it is proper to admit in evidence the schedule and affidavit of property made by the wife of the absent debtor presented to the sheriff with a demand for the property as exempt.⁴ In replevin by the

Pick. (Mass.) 384; *Wolgomot v. Bruner*, 4 Har. & M. (Md.) 89; *Susquehanna v. Finny*, 58 Pa. St. 200; *Kerrigon v. Ray*, 10 How. Pr. (N. Y.) 213; *Hopewell v. Price*, 2 Har. & G. (Md.) 275; *Page v. Fowler*, 28 Cal. 605; *Marchman v. Todd*, 15 Ga. 25; *Frederich v. Gaston*, 1 Greene (Iowa), 401; *Waterman v. Robinson*, 5 Mass. 303; *Orner v. Hollman*, 4 Whart. (Pa.) 45; *Robins v. Kitchen*, 8 Watts (Pa.), 390; *Nicholson v. Hancock*, 4 Hen. & M. (Va.) 491; *Turberville v. Self*, 2 Wash. (Va.) 71; *Maxwell v. Light*, 1 Call. (Va.) 117; *Edmunds v. Leavitt*, 27 N. H. (7 Fost.) 198; *Goodrich v. Hanson*, 33 Ill. 498; *Brooke v. Berry*, 1 Gill. (Md.) 153; *Graner v. Mullen*, 15 Pa. St. 300; *Winslow v. Leonard*, 24 Pa. St. 14; *Dimond v. Downing*, 2 Wis. 498; *Lills, &c., v. Russell*, 22 Wis. 178; *Gardner v. Lane*, 98 Mass. 517; *Lewis v. Burnham* (Kan.), 21 P. 572.

¹ *Cummings v. Gand*, 52 Pa. St. 484.

² *Simpson v. Westenberger*, 28 Kan. 756.

³ *White v. Cross*, 2 Cranch (C. Ct.), 17.

⁴ *Astley v. Capron*, 89 Ind. 167.

wife for her property it is not proper to admit in evidence an assessment roll to show that the husband had had the property assessed as his own.¹ A wife replevied as her own property that had been seized on execution against her husband, and on the trial called her husband to show that it belonged to her. *Held*, proper to cross-examine him as to his own use of the property and of its proceeds, and also as to his business, what he did with his earnings. Evidence that the husband had given a chattel mortgage on his wife's property does not tend to show that he owned it if there is no evidence of his wife's consent or knowledge of it.² In replevin by one claiming property as exempt, the burden is on him to bring himself under the statutory provision that entitles him to recover.³ Plaintiff replevied a horse seized by defendant on execution, claiming him as exempt, and on the trial the defendant swore that the horse was replevied *before* he had time to make the statutory inventory and offered to show that plaintiff had *other* horses liable to execution, but was not permitted to do so. *Held*, that the proposed evidence was material, and its rejection error.⁴ If the property is exempt the value fixed by the appraisal made by the officer for the purpose of the selection referred to above is conclusive in replevin, and other value cannot be shown.⁵

§ 1023. **How far title to real estate may be considered and how shown.** Though as a general rule title to real estate cannot be directly tried in an action of replevin, yet if incidentally brought in question evidence is admissible in regard to it.⁶ In replevin for boards made from trees cut

¹ *Stanfield v. Stiltz*, 93 Ind. 249.

² *Gavigan v. Scott*, 51 Mich. 373 (16 N. W. 769).

³ *Thompson v. Ross*, 87 Ind. 156.

⁴ *Gass v. Van Wagner*, 63 Mich. 610 (30 N. W. 198). The Michigan statute provides that when a levy is made upon any class or species of property which is exempt, the officer shall make an inventory of the whole of the same kind, so that a selection may be made of enough to fill the exemption. How. Stat., § 7687.

⁵ *Wood v. Bresnahan*, 63 Mich. 614 (30 N. W. 206).

⁶ *Clements v. Wright*, 40 Pa. St. 250.

from plaintiff's land, the production of a deed to plaintiff and receipts for taxes paid by him, *held*, sufficient evidence of title.¹ There is no doubt that deeds may be introduced in evidence in the action of replevin, not to show title, but to show the extent of the possession,² or title may be shown to show possession.³ In an action of replevin for rails made from timber cut on wild land it is relevant to prove the title to the land for the purpose of showing who has the right to the possession of the rails, and the title papers are the best evidence of the title to the land attainable, and should be admitted. Though title to land cannot be tried in replevin, it may be brought in issue indirectly.⁴

¹ Davis v. Easley, 13 Ill. 192.

² Caldwell v. Castard, 7 Kan. 303; Davis v. Easley, 13 Ill. 192; Parker v. Storts, 15 Ohio St. 351.

³ Ogden v. Stock, 34 Ill. 522.

⁴ Hart v. Vinsant, 6 Heis. (Tenn.) 616; Clement v. Wright, 40 Pa. 250.

CHAPTER XXXIII.

INSTRUCTIONS.

	Section.		Section.
Theory of instructions . . .	1024	Damages for use . . .	1035
Instructions should be confined to the issues involved	1025	Burden of proof . . .	1036
When no conflict court may direct verdict . . .	1026	On wrongful detention . .	1037
When jury may be instructed that detention is not disputed . . .	1027	Wrongful detention by bailee	1038
When the action lies . . .	1028	Possession evidence of title	1039
Right to possession of property sufficient . . .	1029	Ownership of property—	
As to what right of possession will support the action	1030	Weight of evidence—Credibility of witnesses . .	1040
Taking possession when not practicable by an officer . .	1031	Buildings, when personal property . . .	1041
Where title passes between vendor and vendee . . .	1032	Growing crops . . .	1042
Where both parties claim the property . . .	1033	Demand not necessary . .	1043
Damages . . .	1034	Demand necessary . . .	1044
		Proper demand . . .	1045
		Where demand necessary against officer . . .	1046
		Value of return as evidence	1047
		Mortgage—Tender to discharge lien . . .	1048

§ 1024. **Theory of instructions.** A learned writer has said that while, in the theory of law every case which arises for judgment is decided by some rule which already exists, yet the moment the judgment is made it has, to some extent, modified the rule. So it is with instructions which in theory are terse, well-considered propositions of law, but in fact and in practice it is seldom that the same instruction is proper in two different cases. Courts, in giving instructions do not aim at announcing principles of universal application, but rather to state the law applicable to the peculiar facts of the case under consideration. As the facts in each case vary more or less from the facts in every other case, so must the

wording of the instruction be varied to meet the facts. The instructions given in this work have been approved by courts of last resort as stating the law correctly in the cases where given—and the facts on which they are based, if not shown by the instruction, are given where possible and necessary. It is hoped that they will be some guide in the absence of a more comprehensive work on the subject.

§ 1025. **Instructions should be confined to the issues involved.** Where a man brings replevin in his own name, it is error to instruct the jury that the sale, under which defendant claimed, was made by plaintiff's daughter, while a minor, living with her father, as she could convey no title. The instructions must be confined to the issues raised, the ownership of the horse by the plaintiff in this case.¹ Errors in instructions relating wholly to a theory of the case which the jury specially finds to be untrue are not prejudicial.² In replevin it is error to direct the jury, if they find for the defendant, to fix the value of the property seized at a sum different from that stated in the pleadings of both parties.³ The recovery in replevin must be governed by the pleadings; it is therefore not error to refuse to instruct, that no cause of action has been made against one defendant when the answers admit a joint taking and joint detention.⁴ The assessment of the value of the goods taken by the sheriff is for the purpose of fixing the amount of the bond, and is not conclusive upon the parties; and the refusal of the court to instruct the jury to find the value is error.⁵

§ 1026. **When no conflict, court may direct a verdict.** Where, in an action of replevin, the evidence shows, without conflict, the plaintiffs' ownership of the property in controversy, and the only conflict in the evidence is in relation to irrelevant and immaterial matters, the trial court may,

¹ *Ash v. Mathes*, 52 Mich. 615 (18 N. W. 384).

² *McIntire v. Eastman*, 76 Iowa, 455 (41 N. W. 162).

³ *Houston v. Smythe* (Miss.), 5 So. 520.

⁴ *Moorhouse v. Donaca*, 14 Or. 430 (13 P. 112).

⁵ *Linn v. Wright*, 18 Texas, 317.

without invading or usurping the province of the jury, direct a verdict in favor of the plaintiffs¹—in a replevin case as well as in any other form of action.

§ 1027. **When jury may be instructed that detention is not disputed.** The record showing that the defendants asserted a right of property and of possession adverse to the plaintiff and inconsistent with his claim, and nothing of a contrary tendency appearing, the charge to the jury that the detention of the property was not disputed, *held* to be proper.²

§ 1028. **When the action lies.** The jury are instructed that, to entitle the plaintiff to recover under the issues in this case, it is only necessary that he should prove, by a preponderance of the evidence, that he was the owner of the property in question, and entitled to the possession of the same when this suit was commenced, and that it had been wrongfully taken from his possession by the defendant, or that it was then wrongfully detained by him.³

§ 1029. **Right to possession of property sufficient.** It is not essential to a recovery by the plaintiff in this action, that he should have been at any time the absolute owner of the property, it is sufficient if the proof shows that, before and at the time of the commencement of the suit, the plaintiff was entitled to the possession of the property; that he demanded the same of the defendant before commencing the suit, and after the plaintiff became entitled to such possession, and that the defendant refused to surrender the property to the plaintiff upon such demand.⁴

§ 1030. **As to what right of possession will support the**

¹ James v. Fowler, 90 Ind. 563.

² Johnson v. Moore, 28 Mich. 3.

³ Sackett's Instructions, 475. Citing Hill on Rem. for Torts, 2; Esson v. Tarbell, 9 Cush. 407; Eggleston v. Mundy, 4 Mich. 295. See also Flatner v. Good, 29 N. W. 56; Willis v. Reinhart (Ark.), 12 S. W. 241; Turpie v. Fagg (Ind.), 22 N. E. 743.

⁴ Sackett's Instructions, 475. Citing Campbell v. Williams, 39 Iowa, 646; Noble v. Epperly, 6 Ind. 414; Loomis v. Youle, 1 Minn. 175; Bramwell v. Hart, 12 Heisk. 356. See also Ferguson v. Rafferty (Pa.), 18 A. 484.

action. In a suit brought to replevy cotton, it is proper to instruct the jury that, "if they believe from the evidence that the plaintiff had an interest in the cotton, coupled with a right to take possession and control the same, at the time of the commencement of the action, they must find for the plaintiff, although they may believe from the evidence that other parties had an *ultimate interest* in an account for the proceeds." It is also proper to instruct that to maintain the action it devolves upon plaintiff to prove that he was entitled to the possession of the cotton upon the day specified in his declaration.¹

§ 1031. **Taking possession—When not practicable by an officer.** The jury are instructed that although the law requires an officer, in levying on personal property, to take the same into his possession, yet, in the case of growing crops or other bulky or heavy articles, it only requires him to take such possession thereof, as the article, from its nature, will reasonably admit of; and if the jury believe, from the evidence in this case, that the officer, in attempting to make the levy in question, went to the fields of grain levied on, and had the same in his immediate view and presence, and notified the defendant in execution that he had taken the crops under the execution introduced in evidence, this would be a sufficient levy upon the property in question.²

§ 1032. **Where title passes between vendor and vendee.** The court instructs the jury that, although the lumber was not actually measured, yet if the lumber was sawed under contracts between Putnam and Dicksons, and piled on sticks in Dicksons' lumber yard, separate and apart from other lumber of the same kind as and for the lumber of Putnam, under said contracts—that Dicksons sent Putnam an invoice of the same, stating that it was subject to his order, and that Putnam paid Dicksons for the same upon and after the re-

¹ Bostick v. Britain, 25 Ark. 482. See Titsworth v. Frauenthal (Ark.), 12 S. W. 498; Turpie v. Fagg (Ind.), 22 N. E. 743; Bach v. Tuch, 7 N. Y. S. 611.

² Pierce v. Roche, 40 Ill. 292.

ceipt of the invoice, before the date of the assignment of Dicksons—that the title did not pass to the assignee of Dicksons, but had become the property of Putnam.¹

§ 1033. **Where both parties claim the property**, it is error to instruct the jury “that unless they believe that defendant is the owner they will find for plaintiff.” A further instruction “that unless they are satisfied from a preponderance of evidence” that plaintiff is the owner “they will find for defendant” is not such error as will warrant a reversal.² Where plaintiff claimed he had bought the property and defendant had admitted his title, and defendant claimed to have lent the property to plaintiff, and denied selling it, *held*, proper to instruct the jury to consider the statements as to ownership, and *the denial of the same*, and to determine the ownership from all the testimony.³ A charge that “the plaintiff claims that the defendant detains her property,” and that defendant denies such detention, is misleading as tending to exclude from the consideration of the jury the question of ownership.⁴

§ 1034. **Damages.** In replevin, where the property had been redelivered to defendant, and plaintiff elected before the trial to take judgment for the value, and the judge instructed the jury that if they found for the plaintiff they should “assess the damages at whatever sum may have been proven as the value,” *held*, proper under the circumstances.⁵

§ 1035. **Damages for use.** Where the defendant gave delivery bond and kept the property, this instruction was *held* good: “If you find for the plaintiff in said cause you will assess his damages at the value of the use of the prop-

¹ Martz v. Putnam, 117 Ind. 392 (20 N. E. 270). See White v. Woodruff, 25 Neb. 798 (41 N. W. 781).

² Berry v. Wilson, 64 Mo. 164. In this case, the jury found for the defendant, and plaintiff went up on error on instructions. See Minthon v. Lewis (Iowa), 43 N. W. 465.

³ McDonald v. McDonald, 55 Mich. 155 (20 N. W. 882).

⁴ Chamberlain v. Winn (Wash. T.), 20 P. 780.

⁵ Jeffreys v. Greeley, 20 Fla. 819.

“erty taken by the defendant, from the time of the taking of “the same up to the present time.””

§ 1036. **Burden of proof.** That before the plaintiff can recover he must prove, by a preponderance of evidence, that at the time of the commencement of the suit he was the owner of the property in question, or that he was then entitled to the immediate possession of the same; and he must also further prove, by a preponderance of the evidence, that the defendant wrongfully took the property in question, or else that he wrongfully detained it from the plaintiff, after a demand made upon him by plaintiff for the property.² But where the evidence is conclusive as to the ownership, such an instruction should be refused.³

§ 1037. **On wrongful detention.** The court instructs the jury, that to entitle the plaintiff to recover upon the issue of detention, it is incumbent upon the plaintiff to establish, by a preponderance of evidence, that the goods and property replevied were in the possession of the defendant, or under his control, and that he detained the same from the plaintiff at the time the suit was commenced; and unless the jury believe, from the evidence, that the property in question was in the possession of defendant, or subject to his control at the time the suit was commenced, and that he then detained the same from the plaintiff, then, as to the issue of wrongful detention, the jury should find for the defendant.⁴

§ 1038. **Wrongful detention by bailee.** The jury are instructed, that if they believe from the evidence, that the defendant borrowed the property in question from the plaintiff for a temporary use or purpose, with the understanding that he would return the property on request, and that af-

¹ Bill v. Campbell, 17 Kan. 211. As to damages for use of team, see Minthon v. Lewis (Iowa), 43 N. W. 465.

² Sacket's Inst., 476; Nollkamper v. Wyatt (Neb.), 43 N. W. 357.

³ Peterson v. Polk (Miss.), 6 So. 615.

⁴ Reynolds v. McCormick, 62 Ill. 412. See Deal v. Osborn Co., (Minn.) 43 N. W. 835.

terwords, and before the commencement of this suit, the plaintiff requested and demanded of said defendant that he return said property, and that, upon such demand, the defendant refused to deliver up the possession of the property, then the jury should find the right of property in the plaintiff, and the defendant guilty of a wrongful detention of the same.¹

§ 1039. **Possession evidence of title.** The jury are instructed that peaceable possession is *prima facie* evidence of title.²

§ 1040. **Ownership of property—Weight of evidence—Credibility of witnesses.** “The question then for you to decide is simply this: whether at the commencement of this action Ritchie was owner of the cattle, or Schenck. You are the exclusive judges of the testimony, of what it proves and what it disproves, of its weight, and the credibility of the witnesses. The defendant, Schenck, being in possession at the time of the replevying and claiming ownership, is entitled to the benefit of the presumption of law that he is the owner, and the burden of proof is on the plaintiff to establish, by a preponderance of testimony, that he is the owner, before he can recover.”³

§ 1041. **Buildings, when personal property.** The jury are instructed that where a building is owned by one person, and the land on which it stands is owned by another, then the building is personal property; and it will always remain personal property until the ownership of the land and that of the building unite in the same person.⁴ Where one wrongfully places his building upon the lot of another, in such a way as to attach it to the ground, the building

¹ Simpson v. Wrenn, 50 Ill. 222.

² Martin v. Ray, 1 Black. 291; Ritchie v. Schenck, 7 Kan. 170; Smith v. Jensen (Col.), 22 P. 434.

³ Ritchie v. Schenck, 7 Kan. 170. The above instructions are held good on the general subject of replevin, but in this case the controversy appears to have been over the ownership.

⁴ Crippin v. Morrison, 13 Mich. 23.

will belong to the owner of the land ; but where one rightfully and lawfully places his building on the land of another without any intention of having it belong to the owner of the land, then it will not belong to such land owner.¹ The jury are instructed, that although a building is *prima facie* real estate, and belongs to the owner of the land on which it stands, still it may be personal property and owned by a person who is not the owner of the land ; and the building is personal property when it is erected by the builder with his own means, and for his own use, on the land of another, in pursuance of an understanding between him and the owner of the land, that the building shall belong to the builder.²

§ 1042. **Growing crops.** The jury are instructed, that growing crops, in law, are regarded for some purposes as personal property, and for some purposes as a part of the real estate upon which the crops are growing. As between seller and purchaser of real estate, they are regarded as belonging to the real estate, and will pass with the conveyance of the land to the purchaser, unless they are expressly reserved in writing.³

§ 1043. **Demand not necessary.** If the jury believe from the evidence, that the plaintiff was the owner of the property and entitled to the possession of it, and that defendant took the property wrongfully from the possession of the plaintiff, then a demand and refusal before the commencement of the suit is not necessary to be proved to entitle the plaintiff to recover.⁴ The court instructs the jury that, by this plea in this case, the defendant claims title to the property in him-

¹ Cooley on Torts, 307 ; 1 Hill on Torts, 470 ; Adams v. Goddard, 48 Me. 212.

² Sackett's Instructions, 486.

³ Carpenter v. Jones, 63 Ill. 517.

⁴ Dickson v. Randal, 19 Kan. 212 ; Jones v. Ward, 77 N. C. 337 ; Gilchrist v. Moore, 7 Iowa, 9 ; Newman v. Jenne, 47 Me. 520 ; Stillman v. Squire, 1 Denio, 327 ; Rhoades v. Drummond, 3 Col. 374 ; Smith v. Jensen (Col.), 22 P. 434.

self and denies the right of property and of possession in the plaintiff; and although the jury may believe, from the evidence, that the defendant came rightfully into possession of the property, still, under the pleadings in this case, it is wholly unnecessary for the plaintiff to prove a demand and refusal before commencing the suit, to entitle him to a verdict of wrongful detention; provided the jury further believe, from the evidence, under the instructions of the court, that the plaintiff was entitled to the possession of the property at the commencement of the suit.¹

§ 1044. **Demand necessary.** The jury are instructed, that if they find from the evidence that the property in question came into the possession of the defendant with the knowledge and by the consent of the plaintiff, then plaintiff must make demand for possession thereof before this action would lie; and unless the jury find from the evidence that he did make such demand, they should find for the defendant, unless they further find from the evidence, that the defendant, before the commencement of this suit, had, by his conduct or language, or by both, manifested an intention to disregard and repudiate any claim of right or title in the property by the plaintiff.² The jury are instructed, that if they find from the evidence that defendant unlawfully and tortiously took the property into his possession, then a demand was not necessary. But if the possession was lawful, and the detention was unlawful, then a demand was necessary before the commencement of the action.³

§ 1045. **Proper demand.** The jury are instructed that no set words are necessary to make a proper demand. It is only necessary that the property be properly described or indicated, and the party's intention or desire to assume pos-

¹ Seaver v. Dingley, 4 Greenlf. 306; Lewis v. Masters, 8 Blackf. 244; Smith v. McLean, 24 Iowa, 322; Lewis v. Smart, 67 Me. 206.

² Lewis v. Masters, 8 Blackf. 244; Simpson v. Wrenn, 50 Ill. 222; Story on Bailments, § 266.

³ Thornton on Juries, 153; Lewis v. Marten, 8 Blackf. 244; Graham v. Nowlin, 54 Ind. 389; Roberts v. Norris, 67 Ind. 386.

session of it be unequivocally stated or indicated to the other party.

§ 1046. **Demand when necessary—Against an officer.** The jury are instructed, that if they believe from the evidence that the defendant A B was an acting constable in and for the county of G, and that as such constable the execution in evidence came into his hands to be executed by him, and that while the property in dispute was in the possession and under the control of one or both of the defendants in said execution, the said constable levied the execution upon the property in controversy as the property of one or both of the defendants, such taking and levy would not be unlawful as to the plaintiff, and in such case, unless the jury believe from the evidence that a demand for the property was made before bringing this suit, then the defendant would not be guilty of a wrongful taking or of a wrongful detention.¹ Where by virtue of a writ of attachment against E. the sheriff takes property from the possession of J., and on replevin by J. justifies the taking on the ground of its liability to the attachment, it is proper to instruct the jury that if the property was not subject to the payment of the debts of E. they will find for the plaintiff.²

§ 1047. **Value of return as evidence.** The jury are instructed that, as regards the defendants (the officer and plaintiff in execution in this case), the endorsement and return of the officer upon the execution read in evidence are *prima facie* proof of the time when the execution came into the hands of the officer, the time of the levy, upon what property the same was levied, and what became of the property.³

§ 1048. **Mortgage—Tender to discharge lien.** The court gave the following instructions on behalf of the plaintiff:

“1. The record in this case shows that the possession of the property was in Mudd at the time the proceedings

¹ Tuttle v. Robinson, 78 Ill. 332.

² Waddell v. Magee, 53 Miss. 687.

³ Phillips v. Elwell, 14 Ohio St. 240; Harper v. Moffit, 11 Iowa, 527.

"were instituted, and cannot be contradicted.

"2. The court instructs the jury, that, although they may believe that there was a verbal sale, absolute in its terms, of the property to Mudd by Ingle, and a delivery of it to Mudd, with a condition or understanding between them that Ingle should have his team back upon complying with the conditions of the agreement, then such a sale is simply a pledge of the property to secure the indebtedness, and the ownership of the property is, and was all the time, in plaintiff, subject to the payment of the indebtedness existing between them, for the security of which the property was delivered to Mudd.

"3. The court instructs the jury, that, if they believe from the evidence that plaintiff borrowed the sum of one hundred dollars from defendant, and pledged his team to defendant as security therefor, with the agreement that if said money was paid at the time defendant should come to Rich Hill to attend the Shelt-Mudd trial, plaintiff was to pay nothing for expenses incurred by Mudd in keeping said team; but if said money was not paid at said time, then plaintiff was to pay the sum of twelve dollars per month for keeping the same; and if the jury should believe from the evidence that said one hundred dollars was tendered to defendant while he was at Rich Hill, for the purpose of attending the Shelt-Mudd trial, and defendant refused said sum, then they will find for the plaintiff; and if you find for the plaintiff, then you will assess the damages *plaintiff* has sustained, according to the evidence, by reason of its detention since the time the tender was made, if any, and for any injuries thereto, if any are shown by the evidence, and you will also find the value of said property, and state it in your verdict.

"4. If the jury find from the evidence that it was a part of the contract between plaintiff and defendant that plaintiff should refund to defendant any expenses he might incur in taking care of the team, yet, if the jury find

“the plaintiff tendered, either by himself or by his agent, “the one hundred dollars to the defendant, or the defendant’s attorney, while at Rich Hill attending the Shelt-Mudd trial, about the seventh of January, 1887, and defendant “refused to accept it, and made no objections to the character of the money tendered, or to the time of the tender, and “did not object because the expenses incurred had not been “paid and were not tendered, then such tender was good ; “and if defendant claimed any expenses it was his duty to “name it, and the want of a tender of such an unsettled claim “will not defeat plaintiff’s right to possession ; but if the jury “find that defendant did claim his expenses, and refused on “that account to accept the one hundred dollars, and that “plaintiff declined to pay any more, then said tender was not “good, if they believe the contract was to cover said expenses “also.”

The court gave the following instructions at the request of the defendant:

“5. This is an action commenced by the plaintiff to “recover the possession of the property in dispute, and “the burden of proof rests upon the plaintiff, and before “he can recover in this action, he must show to the satisfaction of the jury by a preponderance of the testimony, that at the time of the commencement of action he “had either a general or special property in, and a right to, “the exclusive and immediate possession thereof. If the “plaintiff has failed to show this the finding should be for “the defendant.

“6. If the jury believe from the evidence that the “plaintiff let the defendant have the possession of said “property to secure the payment of one hundred dollars, “and it was then and there agreed that the plaintiff, by “paying to the defendant the said sum, and all expenses attending the keeping of said property, might, within thirty “days from the time said property was placed in the possession of the defendant, reclaim said property, and the plain-

“tiff did not, within the said thirty days, either pay to the defendant, or tender the said one hundred dollars, and tender or offer to pay the expenses aforesaid to the defendant, or refused to pay said expenses, then the plaintiff cannot recover in this action, and the finding should be for the defendant.”

“7. If the jury believe from the evidence that the plaintiff, before he was entitled to recover said property, was to pay defendant the sum of one hundred dollars, and the expenses of keeping the same, and the defendant demanded the payment of said expenses, and the plaintiff refused to pay the same within the time agreed upon, then the jury should find for the defendant.

“8. The plaintiff, before the commencement of this action, should have demanded of the defendant the return of the possession of said property, and if no such demand has been proved by the evidence, the plaintiff cannot recover.”¹

The above instructions were approved by the supreme court.

¹ Ingle v. Mudd, 86 Mo. 217.

CHAPTER XXXIV.

VERDICT AND FINDING.

Section.	Section.
The verdict should respond to all the issues raised by the pleadings 1049	Where impossible to find the separate value, it may be found in gross 1064
Verdict must be construed with reference to the pleadings 1050	Where the finding is in favor of the party in possession value not so important . 1065
The same—On plea of <i>non detinet</i> and <i>non cepit</i> . 1051	The verdict must describe the property with certainty 1066
The language should be so construed as to sustain the verdict if possible . 1052	Indefinite description fatal 1067
Findings are governed by the same rules as verdicts 1053	Illustrations of verdicts which have been upheld . 1068
Mere informalities not fatal to recovery 1054	Illustrations of verdicts held bad 1069
Verdict may be corrected in form by the court—Surplusage 1055	A conditional verdict is always bad 1070
The verdict must settle the status of all the property involved 1056	Verdicts held bad under plea of <i>non cepit</i> . . 1071
The verdict must respond to all the issues raised, or it is ill 1057	Where the successful party claims less than a full interest, the value of his interest must be fixed 1072
The same—Illustrations . 1058	The same—Illustrations . 1073
The verdict may be general if that answers all the issues 1059	Verdict for damages not essential 1074
Effect of a general finding . 1060	Court may compel a finding of nominal damages . . 1075
The verdict should find the value of the property . 1061	A verdict may be sufficient to support a judgment of return, but not for value . 1076
An omission to fix the value cannot be corrected by the court. 1062	Form of where defense is fraud in vendee's title . 1077
The value of each article should be found separately 1063	General form of verdict . 1078
	A verdict may be returned on Sunday 1079
	Or on a legal holiday . . 1080

	Section.		Section.
Separate defendants are entitled to separate verdicts	1081	Separate issues must not be united by the verdict	1084
Finding partly for defendant and partly for plaintiff proper, when	1082	A verdict which is inconsistent with itself cannot stand	1085
Each party may submit special issues to the jury	1083		

§ 1049. **The verdict should respond to all the issues raised by the pleadings;** it should find whether the successful party is the general or special owner—if the latter the value of his special property in the goods—and who is entitled to possession and the value of that possession; should describe the property specifically or by reference to the pleadings or return of the officer, and find its value and also the damages for taking or detention. The statute or rules of practice frequently specify what the verdict shall be in certain cases. A general finding for plaintiff or defendant is frequently sufficient. But where any particular point is in controversy it is proper that the jury should find the fact specially on this point, in addition to the general verdict. It is important that the verdict be clear and explicit, and that it settle all the issues involved, as the judgment must conform to the verdict. The gist of the action is the unlawful detention, and the verdict must speak unequivocally on this point.¹ The finding as to the right of possession must be clear.² If property has been delivered to plaintiff, and the jury find for defendant, they must find whether he had right of property or right of possession only at the commencement of the action. If they find either in his favor, they must find the value of the property or the value of the possession of the same, and damages for withholding the property. If the verdict is silent on these points, no judgment can be rendered for any amount whatever.³ The verdict in replevin should pass upon the question of unlawful detention, but

¹ Mercer v. James, 6 Neb. 406.

² Bates v. Wilbur, 10 Wis. 415.

³ Search v. Miller, 9 Neb. 26 (1 N. W. 975).

where it does not, and the question of unlawful detention is controlled entirely by ownership, which is expressly covered by the finding, it is sufficient, and judgment will be entered upon the verdict.¹

§ 1050. **Verdict must be construed with reference to the pleadings.** A verdict or the finding in replevin should always be considered in connection with the pleadings. And if the facts admitted by the pleadings and the facts found by the court, considered together, are sufficient to sustain the judgment of the court below, that is all that is required.² Where the verdict was for the defendant generally, and that he was the owner and entitled to the possession. *Held*, that this, under the answer, must be construed as a finding that the general ownership was in the parties alleged by defendant.³ The jury found "for the defendant, and that he was entitled to the possession of the property," and also found its value and his damages for its detention. *Held*, that in view of the issues submitted, the verdict must be construed as a finding that the property belonged to both defendants in common, each owning one-half thereof, and as the value of defendant's interest may be determined therefrom by computation, it is not defective for failing to find such value expressly, as it substantially disposes of all the issues.⁴ Where defendant justified as sheriff under an execution against K., the finding was that plaintiff, before the levy, took title to the property in dispute to secure himself and two others against their liabilities as sureties on the official bond of K. *Held*, that the presumption from this finding is, that the whole legal title, with the possession, was vested in plaintiff conditionally as mortgagee, and this was sufficient to maintain the action. A finding made nearly a year after action

¹ *Eiseley v. Malchow*, 9 Neb. 174 (2 N. W. 372).

² *Brookover v. Esterly*, 12 Kan. 149; *Blakesly v. Rossman*, 44 Wis. 550.

³ *Blakeslee v. Rossman*, 44 Wis. 553. This is not the same case as above.

⁴ *Ela and another v. Bankes*, 37 Wis. 89.

brought that plaintiff is the owner and entitled to the possession, construed to relate to the title at the commencement of the action.¹ The verdict and judgment in replevin only restore possession in accordance with the title laid in the declaration.² Plaintiff sold to defendant on trial, as they alleged, certain property, taking his notes for three hundred dollars, the purchase price, but no part thereof was paid. In an action to replevy the property there was a general verdict for defendant. *Held*, that it was properly set aside, because it did not determine the value of defendant's interest in the property, and no just judgment could be rendered thereon.³

§ 1051. **The same—On a plea of non detinet and non cepit**, a verdict, "We, the jury, find the issues for the defendant," would be regarded as finding upon those issues alone, and not upon the right of property in the plaintiff at all, but where defendant with those pleas filed plea of property in himself, such verdict will be construed as finding the property in defendant.⁴ The defendant pleaded (1) *non cepit*, (2) an avowry, averring the goods taken to be his property, to which plaintiff replied and took issue. The jury found a general verdict for the plaintiff on the issue of *non cepit* and ignored the other issue, and judgment was rendered according to the verdict.⁵

§ 1052. **The language should be so construed as to sustain the verdict if possible.** Where in an action of replevin the jury, in response to one special question, have answered that the property was not detained or held by defendant when the suit was brought, and to another that he was connected with the detention or possession thereof, it is to

¹ *Riess v. Delles*, 45 Wis. 662; *Frisbee v. Langworthy*, 11 Wis. 376; *Welch v. Sackett*, 12 Wis. 244.

² *Herzberg v. Sachse*, 60 Md. 426.

³ *Peck v. Bonebright*, 75 Iowa, 98 (39 N. W. 213).

⁴ *Bourk v. Riggs*, 38 Ill. 320; *Hanford v. Obrecht*, 38 Ill. 493; *Underwood v. White*, 45 Ill. 437.

⁵ *Thompson v. Buton*, 14 Johns. (N. Y.) 84.

be presumed their meaning was that though defendant did not personally hold or detain the property, he was a party in some way to the detention, and so construed as to uphold the general verdict.¹ Where a case in replevin is so submitted as to leave it a question on the verdict as to the time when a sale was consummated, it will be presumed they completed it at that time which best upholds the verdict.² If a verdict can be understood, it will be sustained although informal, but if it is so uncertain that it cannot be understood, it will be set aside.³ A verdict which fails to find the amount due cannot be made definite by rendering judgment for the amount demanded.⁴ Where word "possession" is omitted from the verdict, but the special findings of the jury and the evidence show that the plaintiff is the owner of the property, and entitled to the possession thereof, the verdict will not be set aside because of the defect.⁵

§ 1053. **Findings are governed by the same rules as verdicts.** In replevin tried to the court without a jury, a finding for defendants sufficiently determines issues joined upon *non cepit* and property in a stranger.⁶ Finding by a trial judge must be something more than a rambling statement of

¹ Foster v. Gaffield, 34 Mich. 356.

² Sandler v. Bresnahan, 54 Mich. 342 (20 N. W. 69).

³ Mitchel v. Burch, 36 Ind. 529. This was replevin for eighteen hogs, and the jury returned the following verdict: "We, the jury, find the property replevied to be the property of the plaintiff, and assess his damages at \$25, and assess his damages for the detention thereof at \$25.

"GEORGE RIDGE, Foreman."

"We, the jury, find the nine hogs not replevied to be the property of the plaintiff, and are of the value of \$95, and assess his damages for the detention thereof at \$95.

GEORGE RIDGE, Foreman."

Held, that the verdict was sufficient; that the verdict should have been all in one, but that the rendition of judgment for \$25 damages rendered it certain and that it was not necessary to find the value. See Jones v. Julian, 12 Ind. 274; Collins v. Makepeace, 13 Ind. 448.

⁴ Taylor v. Hathaway, 29 Ark. 597.

⁵ Hershisier v. Delone, 24 Neb. 380. In this case there were five special findings of fact which, taken together, settled all the issues and determined the right to possession.

⁶ Freas v. Lake, 2 Col. 480.

facts, items of evidence, offers of proof, rulings, etc. Such a document cannot be made the basis of a judgment.¹ The findings by the court where a jury is waived takes the place of the verdict, and is governed by the same rules so far as they are applicable. The court should find upon all the issues involved. If the finding is for the plaintiff it should show the value of the property and that the plaintiff is the owner or entitled to the possession, or both, should assess the damages and order a delivery if not already delivered.²

§ 1054. **Mere informalities not fatal to recovery.** A party will not be deprived of a recovery because of a mere informality in a verdict; thus, a verdict, "do assess *damages* at \$825, and actual damages at \$24.75," the word *value* should have been used for the first word *damages*. *Held*, that a correct judgment rendered on this verdict would not be set aside.³ But the court cannot add nominal damages where none are found,⁴ or a statement of the value of the property where the verdict fails to find the value.⁵ Verdict "that plaintiff was entitled to the possession of the goods" in a case where plaintiff only claimed as agent of another party, *held*, that defendant was not prejudiced by the omission of the words "as agent" from the finding, and that judgment should be entered for the full value of the books unless returned.⁶

§ 1055. **Verdict may be corrected in form by the court.**—**Surplusage.** Where a verdict does not state with technical accuracy the finding of the jury upon the issue tried, the court may correct it in form, or reject part of it as surplusage;⁷ or the jury may be returned to the jury room to cor-

¹ Steele v. Matterson, 50 Mich. 313 (15 N. W. 488).

² Beemis v. Wylie, 19 Wis. 319; Bates v. Wilbur, 10 Wis. 416; Beckwith v. Phileo, 15 Wis. 224; Huron v. Beckwith, 1 Wis. 17.

³ Brannin v. Bremen, 2 N. M. 40.

⁴ Bemis v. Beekman, 3 Wend. 671.

⁵ Wallace v. Hilliard, 7 Wis. 627; Taylor v. Hathaway, 29 Ark. 597; Eaton v. Caldwell, 3 Minn. 134.

⁶ Morris v. Burley, 74 Iowa, 45 (36 N. W. 882).

⁷ Ashton v. Touhey, 131 Mass. 26; Easton v. Worthington, 5 S. & R.

rect it,¹ or with instructions to make more specific findings, or to find upon all the issues joined.² It is clearly within the province of the court to correct mere formal mistakes in the verdict so as to make it legally express what the jury intended; but the court cannot in any way change or modify the intention of the jury. If it is erroneous the court may set it aside but cannot modify it.³ A verdict in replevin may be corrected in form before the jury is discharged, where no objection was made. The following verdict, which failed to find whether defendant had the right of property or right of possession only, *held*, good: "We, the jury find for the defendant, and we assess the value of the property replevied at \$25.00, and we assess the defendant's damages at \$1.16 $\frac{2}{3}$, and that an alternative judgment should be rendered thereon."⁴ In replevin the value of the property is strictly a question of fact to be found by the jury.⁵ Where the instructions fairly present the matter in issue to the jury, their verdict must be regarded as final.⁶ In replevin where the jury sealed a verdict "for plaintiff to the amount of replevin with interest" and separated, and on opening the verdict the next morning, the court, after instructing them to find a verdict in an exact amount, submitted to them a calculation of the amount of the replevin with interest. The jury accepted this amount and rendered a verdict therefor, upon which judgment was rendered; *Held*, not to be error; the court had power to put (Pa.) 130; Thompson v. Musser, Dall. 458; Donaldson v. Johnson, 2 Chand. (Wis.) 160.

¹ Crocker v. Hoffman, 48 Ind. 207; Owens v. Gentry (S. C.), 9 S. E. 525.

² Hunt v. Bennett, 4 Green. (Iowa) 515.

³ Donaldson v. Johnson, 2 Chand. (Wis.) 160; Coit v. Waples, 1 Minn. 134; Frazier v. Laughlin, 1 Gilm. 347; O'Brien v. Palmer, 49 Ill. 73; O'Keef v. Kellogg, 15 Ill. 351; Osgood v. McConnell, 32 Ill. 75; Thompson v. Button, 14 Johns. 86; Hinekley v. West, 4 Gilm. 136; Moore v. Devol, 14 Iowa, 112; Wallace v. Hilliard, 7 Wis. 627; Dunbar v. Bittle, 7 Wis. 144; Ford v. Ford, 3 Wis. 399.

⁴ Copeland v. Majors, 9 Kan. 104.

⁵ Kirkpatrick v. Cooper, 88 Ill. 210.

⁶ Ingle v. Mudd, 86 Mo. 216.

the verdict in proper form.¹ In assessing the value or amount of recovery, the jury should include in their verdict any interest found to be due; but where the rate of interest and the dates between which it is to be reckoned are stated in the verdict, the court can determine the amount of the interest with absolute certainty, and may properly include the same in the judgment entered on such verdict.²

§ 1056. **The verdict must settle the status of all the property involved.** If a verdict fails to determine the rights of the parties as to all of the property in question it is fatally defective, and no valid judgment can be entered thereon.³ The verdict and judgment in replevin must determine the right to the possession of all the property involved. The defect is not aided by the fact that the omitted property had not been taken from defendant's possession, nor that the answer did not claim a return of it.⁴

§ 1057. **The verdict must respond to all the issues raised, or it is ill.**⁵ A verdict in replevin, that the plaintiff is entitled to the property, is not responsive to the issue of *non cepit* and property in defendant, and no valid judgment can be rendered upon it.⁶ A verdict failing to respond to the issue raised by the pleadings is a nullity, and no judgment can be rendered thereon.⁷ By this is meant that the jury must pass upon all the issues submitted to them by the

¹ Smith v. Meldren, 107 Pa. 348.

² Mills v. Mills, 39 Kan. 455 (18 P. 521). See Citizens Bank v. Bowen, 25 Kan. 117; Wilson v. Means, 25 Kan. 83.

³ Young v. Lego, 38 Wis. 206; Child v. Child, 13 Wis. 17; Appleton v. Barrett, 22 Wis. 568.

⁴ Carrier v. Carrier, 71 Wis. 111 (36 N. W. 626).

⁵ Mattson v. Hanisch, 5 Bradw. (Ill.) 102; Nelson v. Bowen, 15 Bradw. (Ill.) 477; Woodburn v. Chamberlain, 17 Barb. (N. Y.) 446; Appleton v. Barrett, 22 Wis. 568.

⁶ Smith v. Houston, 25 Ark. 183.

⁷ Muller v. Jewell, 66 Cal. 216 (5 P. 84). This was an action to recover cattle of G. O. brand. The verdict was that plaintiff was entitled to one-half of the cattle of the G. O. brand, and did not dispose of the other half at all. The pleadings did not raise this issue at all, the answer being a general denial.

court, and it is the duty of the court to submit to the jury all issues raised by the pleadings.¹ In replevin the general rule undoubtedly is, that the verdict must comprehend all the issues submitted by the record before a judgment founded on it can be entered. But the verdict need not be expressed formally and precisely in the words of the issues. If there be a substantial finding, so that the meaning of the jury can be ascertained therefrom, the court will mold it into form and give it effect, though it be irregular and faulty in expression, or contain superfluous matter.² Under the common law, if the verdict fail to respond to all the issues, the proper proceeding was by a *venire de novo*, and not for a motion for a new trial.³

§ 1058. **The same—Illustrations.** * A verdict that finds there was no wrongful detention is sufficient, as this is the gist of the action of replevin.⁴ Where the petition alleges ownership and right of possession in the plaintiff and wrongful detention by the defendant, a general verdict for plaintiff finds all these issues for the plaintiff, and is proper.⁵ A general verdict "for the plaintiff" finds all the issues in his favor where both his title and right of possession were in issue; such a verdict determined that he was the owner and entitled to the possession.⁶ Where the title as well as the right to the possession is in issue, and the verdict is

¹ *Patterson v. United States*, 2 Wheat. 221; *Wilcoxon v. Annesley*, 23 Ind. 287; *Dana v. Bryant*, 1 Gilm. 104; *Briggs v. Dow*, 19 Johns. 95; *Jack v. Martin*, 12 Wend. 316; *Machette v. Wonless*, 1 Col. 225; *Woodburn v. Chamberlain*, 17 Barb. 446.

² *Lindauer v. Teeter*, 41 N.J. 255; *Middleton v. Quigley*, 7 Halst. 352; *Phillips v. Kent*, 3 Zab. 155; *Stewart v. Fitch*, 2 Vroom, 17; *D., L. & W. R. R. Co. v. Toffey*, 9 Vroom, 525; *Rees v. Morgan*, 3 T.R. 349; *Thompson v. Button*, 14 Johns. 84; *Smith v. Smith (Or.)*, 21 P. 439; *Washburn v. Huntington (Cal.)*, 21 P. 305.

³ *Bosseker v. Cramer*, 18 Ind. 45; *Miller v. Trets*, 1 Ld. Raym., 324; *Wallace v. Hilliard*, 7 Wis. 627; *Smith v. Wood*, 31 Md. 293.

⁴ *Town of Leroy v. McConnell*, 8 Kan. 273.

⁵ *Arthur v. Wallace*, 8 Kan. 267.

⁶ *Eldred v. The Oconto Co.*, 33 Wis. 133; *Krause v. Cutting*, 28 Wis. 655, syllabus. The opinion is found in 32 Wis. 687.

only as to the right of possession, the issue as to title is not determined, and a new trial should be granted.¹ Where the plaintiff sets up several distinct causes of action and the general issue is pleaded, and the verdict finds for him on certain specified causes and is silent as to the others, it is sufficient to support a judgment to the extent to which it finds for him.² Verdict that the "defendant had a special property in the goods to an amount of an execution," giving it, and that the "plaintiff had unjustly taken and detained it," and assessing damages, is sufficient, though it ought to determine the general ownership.³ In replevin for two slaves, "Ben" and "Joe"—verdict, "we find for the plaintiff for Ben," and nothing said about "Joe"—*held* that this was a verdict upon all the issues, for the silence as to "Joe" was equivalent to an express finding as to him for the defendants.⁴

§ 1059. **The verdict may be general if that answers all the issues.** Where from the nature of the issues raised a general verdict for one party disposes of all the issues, it is sufficient.⁵ Where the plaintiff claimed as absolute owner

¹ *Appleton v. Barrett*, 22 Wis. 568. See *Richardson v. Adkins*, 6 Blackf. 142. "We find the property to be in the plaintiff," *held*, not good as it did not find who detained the property. *Huff v. Gilbert*, 4 Blackf. (Ind.) 19; *Smith v. Houston*, 25 Ark. 184. *Non detinet* does not settle the right of property, and where that issue is involved such verdict is insufficient. *Bemus v. Beekman*, 3 Wend. 668; *Emmons v. Dowe*, 2 Wis. 322. So *non cepit* does not settle the title and is insufficient where that issue is involved. *Heron v. Beckwith*, 1 Wis. 22; *Moulton v. Smith*, 32 Me. 406.

² *Brockway v. Kinney*, 2 John. 210; *Freas v. Lake*, 2 Col. 480; *Ward v. Masterson*, 10 Kan. 78; *Lewis v. Lewis, Minor* (1st Ala.), 95; *Irwin v. Knox*, 10 John. 865; *Markham v. Middleton*, 2 Strang, 1259.

³ *Single v. Barnard*, 29 Wis. 463; *White v. Jones*, 38 Ill. 161.

⁴ *Wittick v. Trann*, 27 Ala. 566. See also *Stoltz v. The People*, 4 Scam. (Ill.) 168; *Hotchkiss v. Ashley*, 44 Vt. 198; *Brown v. Smith*, 1 N. H. 36; *Clark v. Keith*, 9 Ohio, 73.

⁵ *Ramsey v. Waters*, 1 Mo. 406; *Freas v. Lake*, 2 Col. 480; *Clark v. Heck*, 17 Ind. (Harr.) 281; *Underwood v. White*, 45 Ill. 438; *Huston v. Wilson*, 3 Watts, 287; *Faulkner v. Meyers*, 6 Neb. 415; *Hunt v. Bennett*, 4 Green. (Iowa) 512; *Krause v. Cutting*, 28 Wis. 655; *Id.*, 32 Wis. 688; *Wheat v. Cotterlin*, 23 Ind. 85; *Rhodes v. Bunts*, 21 Wend, 19.

and entitled to immediate possession of the property, and the verdict was, "we, the jury, find for the plaintiff," it was held sufficient to warrant judgment for the plaintiff, that it amounted to a finding that plaintiff was absolute owner, and entitled to immediate possession.¹ But a general verdict will not do where the issues are conflicting, and such verdict does not answer the issues raised.² In such cases special findings should be made, and the findings should always show whether they refer to the title or right of possession, and both should be found.³

§ 1060. **Effect of a general finding.** A general finding in an action of replevin for the plaintiffs is equivalent to a finding that the plaintiffs are the owners and entitled to the possession.⁴ A general verdict for the defendant in a replevin suit is, as against the plaintiff, a finding on all the issues, and he cannot question it by a *venire de novo*.⁵ A verdict for the defendant and that he was entitled to the return of the property seized, *held*, sufficient without an assessment of the value of the property or damages for its taking or detention.⁶ A general verdict settles in favor of the prevailing party every question of fact.⁷

§ 1061. **The verdict should find the value of the property.** This is especially important where the finding is in favor of the party not in possession, for in such a case a verdict which failed to fix the value would be fatally defective as no proper judgment could be rendered upon it. The

¹ Rowan v. Teague, 24 Ind. 304.

² Hewson v. Saffin, 7 Ohio, Pt. II. 234; Johnson v. Howe, 2 Gilm. 346.

³ Wolf v. Meyer, 12 Ohio St. 432. See Eldred v. The Oconto Co. 33 Wis. 137; Stephens v. Scott, 13 Ind. 515.

⁴ Payne v. June, 92 Ind. 253; Rowan v. Teague, 24 Ind. 304; Crocker v. Hoffman, 48 Ind. 207; Everit v. Walworth, 13 Wis. 419; Fitzer v. McCannon, 14 Wis. 63; Wheat v. Caterlin, 23 Ind. 88; Stephens v. Scott, 13 Ind. 515; Gotloff v. Henry, 14 Ill. 384.

⁵ Baldwin v. Burrows, 95 Ind. 81.

⁶ Burket v. Pheister, 114 Ind. 503 (16 N. E. 813).

⁷ Soria v. Davidson, 9 N. Y. Civ. Proc. R. 23 (Id. 53 Sup. Ct. 52).

finding of value and the assessment of damages should be kept separate in both the verdict and judgment.¹ This cannot be done without evidence on this point, but where the jury without evidence found the value, but no judgment was rendered except for costs, the error is without prejudice.² The failure to find value should be called to the attention of the court as soon as discovered.³ The only correct practice is to find the value in all cases.⁴ On verdict for plaintiff, if the property be in possession of defendant and is not returned or cannot be found to answer the judgment, he is entitled to judgment for the value thereof, whether demanded by the complaint or not.⁵ Where a defendant in replevin has waived return, he is entitled to a verdict for the value of such property in his possession as is claimed by the declaration, but as to the ownership of which there is no evidence.⁶ A verdict for defendant which does not find the value of the property is defective.⁷ Where the property was delivered to the plaintiff and the jury found for the defendant, but did not assess the value, but judgment was rendered for a return or the value, *held*, a fatal omission and reversed.⁸ But the objection that it does not find the value comes too late after judgment.⁹ In an action to recover personal property, which has not been delivered to plaintiff, the jury should assess the value of the property and damages for its detention, and not

¹ *Garland v. Bartels*, 2 N. M. 1; *Glanu v. Younglove*, 27 Barb. 480.

² *Battis v. McCord*, 70 Iowa, 46 (30 N. W. 11).

³ *Watts v. Green*, 30 Ind. 99.

⁴ *Farmers L. & T. Co. v. Com. Bank*, 15 Wis. 424; *Everit v. Walworth*, 13 Wis. 419; *Wallace v. Hilliard*, 7 Wis. 627; *Fitzer v. McCannon*, 14 Wis. 63. This should be done though no issue is made upon it. *Jenkins v. Steanka*, 19 Wis. 126; *Young v. Parsons*, 2 Met. (Ky.) 499; *Bates v. Buchanan*, 2 Bush. (Ky.) 117; *Pickett v. Bridges*, 10 Humph. (Tenn.) 175; *Carson v. Applegarth*, 6 Nev. 188; *Lambert v. McFarland*, 2 Nev. 58.

⁵ *The Singer Mfg. Co. v. Doxey*, 65 Ind. 65.

⁶ *White v. White*, 58 Mich. 546 (25 N. W. 490).

⁷ *Wallace v. Hilliard*, 7 Wis. 627.

⁸ *Young v. Parsons*, 2 Metc. (Ky.) 499.

⁹ *Heald v. Cushman*, 30 Me. 461.

simply find a general verdict for damages ; and the judgment in such a case should be for the recovery of the property, or the value thereof in case a delivery could not be had, together with damages for its detention.¹ Where the complaint in replevin alleged the value of the property on June 22, 1870, to be \$570, and the answer denied that it is or was on said day worth \$570, and there was no testimony on the subject of value, *held*, that the pleadings justified a finding of any sum not over \$570 as the value by the court, and that a finding of that exact amount was not error sufficient to reverse the case.² The value stated in the affidavit is not conclusive upon the jury, but they may assess the value of the property detained at any amount which the proof may show, within the value alleged in the petition.³

§ 1062. **An omission to fix the value cannot be corrected by the court.** Where, upon trial of an action of replevin, the verdict of the jury does not fix the value of the property, the court cannot supply the omission.⁴ The verdict should fix the value of the property at the time of trial; this omission cannot be supplied by the court by inserting in the judgment a sum of money as the value of the property.⁵ A verdict which fails to find the value of the property is insufficient, and cannot be corrected by reference to a note of the phonographic reporter in his report of the trial. A verdict to serve as the basis of a judgment must be complete and certain, otherwise both the verdict and judgment entered thereon are erroneous.⁶

§ 1063. **The value of each item should be found separately.** The verdict should find the value of the various

¹ Phillips v. Melville, 10 Hun. (N. Y.) 211.

² Blackie v. Cooney, 8 Nev. 41.

³ Mills v. Mills, 39 Kan. 455 (18 P. 521).

⁴ Pakas v. Racey, 13 Daly, 227.

⁵ Pakas v. Racey, 2 How. Pr. (U. S.) 277.

⁶ Stewart v. Taylor, 68 Cal. 5 (8 P. 605). See Garlick v. Bower, 62 Cal. 65; Vanderford v. Foster, 62 Cal. 179; Dougherty v. Haggin, 56 Cal. 522; Kelley v. McKibben, 54 Cal. 192.

items of property replevied separately, as the whole may be returned, or a part only, in satisfaction of the judgment *pro tanto*.¹ A verdict for plaintiff must ascertain to what specific property the plaintiff is entitled, and its value.² In an action of replevin for several distinct articles, if the jury assess their value *in solido*, they should be sent back to affix a separate value to each article. The defendant who retained the property has a right to return any one of the articles or its value,³ and where it is a stock of merchandise, it is not error for the court, on sending them back, to permit them to take an invoice proved to have been correct.⁴ In an action of claim and delivery of a stated number of hogs, of which the aggregate value only is alleged, a finding that each hog was of the value of four dollars is proper when the only evidence is that they were worth four or five dollars per head.⁵ A verdict *in detinue* for several articles should specify the value of each article.⁶ In replevin for several cattle, where the verdict fails to find the separate value of each, the judgment will be reversed and case sent back for the sole purpose of finding the separate value of each, but will not be disturbed in other respects.⁷ This is a matter of statute in many states, and is the better practice always where it is possible to do it. It is intended for the benefit of the party who is adjudged to return the goods, that if he

¹ Cook v. McElvey, 65 Texas, 1. See Hoesser v. Kraeka, 29 Texas, 450; Blakely v. Duncan, 4 Texas, 185; Bennet v. Butterworth, 8 How. (U. S.) 128; Drane v. Hilzheim, 21 Miss. (13 S. & M.) 336.

² Gulath v. Waldstein, 7 Mo. App. 66; Mahoney v. Smith, 7 Mo. App. 578.

³ Houf v. Ford, 37 Ark. 544; Noland v. Leech, Exrs., 10 Ark. 504.

⁴ Hickman v. Ford, 43 Ark. 207.

⁵ Black v. Black, 74 Cal. 520 (16 P. 311).

⁶ Jones v. Anderson, 76 Ala. 427; Id., 82 Ala. 302; Haynes v. Crutchfield, 7 Ala. 189; Miller v. Jones, 29 Ala. 174; Rambo v. Wyatt, 32 Ala. 363; Rose v. Pearson, 41 Ala. 687; Johnson v. McLeod, 80 Ala. 433; Jones v. Pullen, 66 Ala. 306; Townsend v. Brooks, 76 Ala. 308; Savage v. Russell, 84 Ala. 103; Southern Warehouse v. Johnson, 85 Ala. 178 (4 So. 643); Ketchum v. Brennan, 53 Miss. 596.

⁷ Sprotley v. Kitchens, 55 Miss. 578.

return but a part of the property, proper credit may be given him. It would seem, however, if he waives the separate assessment of value, a value in gross is sufficient.¹

§ 1064. **Where impossible to find the separate value, it may be found in gross.** Where the action was for ninety articles of household property worth about \$300, a finding in gross of the value in the absence of objection at the bringing in of the verdict, is sufficient, and on appeal it will be presumed that the evidence was as to the value in gross, in order to uphold the verdict.² Where the jury find that it is impracticable to assess the value of each article, and assess the value in gross at \$2,000, *held*, good.³ In replevin, where defendant retained the property but plaintiff was successful, a finding of the value of each article is not necessary, and in order to recover a judgment for the value of the property, plaintiff need not show the value of each article.⁴ Where replevin is for a stock of goods, and the jury, finding for the defendant, return the value of the stock in bulk, and not of each separate article, *held*, no error, when no demand is made at the time for the valuation of each or any particular article separately.⁵

§ 1065. **Where the finding is in favor of the party in possession, value is not so important.** Failure to find value where plaintiff is in possession is not such an error that defendant can take advantage of it if the result is adverse to him.⁶ And where the defendant is in possession at the time of trial and the result is in his favor, the plaintiff cannot com-

¹ *Whitfield v. Whitfield*, 40 Miss. 369; *Pickett v. Bridges*, 10 Humph. (Tenn.) 175; *Caldwell v. Bruggerman*, 4 Minn. 270; *Drane v. Hiltzheim*, 13 S. & M. (21 Miss.) 337; *Eslava v. Dillihunt*, 46 Ala. 698; *Hoeser v. Kraeka*, 29 Texas, 451.

² *Eslava v. Dillihunt*, 46 Ala. 698.

³ *Wilson v. Barnes*, 49 Ala. 134.

⁴ *Goldsmith v. Wilson*, 67 Iowa, 662 (25 N. W. 870). This was a stock of goods.

⁵ *Blake v. Powell*, 26 Kan. 320.

⁶ *Jones v. Pullen*, 66 Ala. 306.

plain that the jury did not assess the value of the property.¹ But where the verdict awards the possession of a chattel to the person to whom it has been delivered, it is not necessary that it fix the value.² In an action of replevin, where the pleadings admitted that the property was worth \$5,153.96, and the plaintiff recovered, but the jury found that the property was worth only \$4,268.51, and judgment was rendered accordingly, *Held*, not error as against the defendant.³ Where, in an action of replevin, the property has been already delivered to the prevailing party, a general verdict in his favor is sufficient without a finding upon the question of value.⁴

§ 1066. **The verdict must describe the property with certainty.** Thus, where four hogs were in issue, and the jury found for the plaintiff for two without stating which two, the verdict was too uncertain to support a judgment.⁵ But a verdict may describe the property by a reference to the petition.⁶ If there is no dispute as to the identity of the property, this would probably be a sufficient description in all cases where all of the property is awarded to one party.

§ 1067. **Indefinite description fatal.** Where action was brought for sixty-eight head of hogs, a verdict that "the plaintiff is entitled to that portion of the property described in the complaint, to wit forty-nine hogs," and assessing the value at \$12 per head, is too indefinite to support a judgment.⁷ A judgment in replevin, awarding a writ of *retorno habendo*, will not be regarded as too general in the

¹ Lucas v. Daniels, 34 Ala. 188.

² Claffin v. Davidson, 8 N. Y. Civ. Proc. R. 46; Williams v. Wilcox, 66 Iowa, 65 (23 N. W. 266).

³ Miller v. Krueger, 36 Kan. 344 (13 P. 641).

⁴ Prescott v. Heilner, 13 Or. 200 (9 P. 403).

⁵ Matchette v. Wanless, 1 Col. 225; Dowell v. Richardson, 10 Ind. 573; Campbell v. Jones, 38 Cal. 507.

⁶ Anderson v. Lane, 32 Ind. 102.

⁷ Guille v. Wong Fook, 13 Or. 577 (11 P. 277). See Foredice v. Rinehart, 11 Or. 208, and cases cited; Low v. Martin, 18 Ill. 286; Dillingham v. Smith, 30 Me. 370; Dowell v. Richardson, 10 Ind. 573.

description of the property, if it follow the declaration in that regard.¹ In replevin for two mares the verdict was "we find for plaintiff as to one of the mares, as to the other we find for defendant," and assessing damages for both, etc., *held*, that both the verdict and judgment rendered thereon were void for uncertainty of description.²

§ 1068. **Illustrations of verdicts which have been upheld.** Where the answer denied plaintiff's title and right of possession and pleaded title in defendant, a verdict, "We, the jury in the above cause, find for the defendant," *held*, sufficient, and that judgment for a return and for costs should be entered thereon.³ A verdict, "We, the jury, find the issues for the defendant," is informal but sufficient if judgment be entered upon same; neither verdict nor judgment can be attacked, in a collateral proceeding, for insufficiency.⁴ In an action of claim and delivery before a justice, where the complaint states the value of the property, a verdict, "We, the jury, find for plaintiff, less damages claimed," without finding value, though erroneous, is not void, and judgment thereon for a return of the property will be upheld, and mandamus will lie to compel issue of execution thereon.⁵ In replevin the jury found that plaintiff was the owner of the property and entitled to its possession at the commencement of the action, its value, and nominal damages for its detention, without finding expressly an unlawful detention, and without any general verdict in his favor; but the answer admitted the taking, and the undisputed evidence shows a due demand and refusal. *Held*, that the defect in the verdict is no ground

¹ Lammers v. Meyer, 59 Ill. 215.

² Harris v. Austell, 2 Bax. (Tenn.) 148.

³ Anderson v. O'Laughlin, 1 Mont. 81. See also Lavelle v. Lowry, 5 Mont. 498 (6 P. 337); King v. Ramsey, 13 Ill. 623; Underwood v. White, 45 Ill. 437; Lewis v. Buck, 7 Minn. 105 (4 S. 235).

⁴ Robbins v. Foster, 20 Mo. App. 519; Sweeney v. Lomme, 22 Wall. 208; State ex rel. Johnson v. Dunn, 60 Mo. 64.

⁵ Hogue v. Fanning, 73 Cal. 54 (14 P. 560).

of reversal.¹ Where, A under a claim of ownership, replevies goods held by a sheriff on execution against B, and the answer avers that they were the property of B, a verdict that "the sheriff at the commencement of the action had the right "of possession," is responsive to the issue and is a finding in substance that the property was that of the execution debtor.² Unless the facts in a replevin suit before a justice require a special finding, a verdict that "this jury finds for "the plaintiff," is sufficient, and judgment must be entered upon it.³ The same strictness is not required in justice court.⁴ In an action before a J. P., where the goods had been delivered to plaintiff, the following finding held good and sufficient: "I do find for the plaintiff and against the defendant for the goods and for all the costs of this action by her expended."⁵ A verdict "the jury find for the plaintiff "and against the defendant," *held*, sufficient in substance.⁶ Where the defendant pleaded property in himself and others, representatives of A, property in B, and also property in himself alone, issues joined on this, the jury found for the defendant on the first plea alone, disregarding the other issues, *held*, that this finding was sufficient.⁷ Where the petition alleges a value of property, and the jury find both right of property and possession in defendant, and assess the damages at a small advance on the alleged value, the verdict is sufficient without a finding as to the value of the property.⁸ In a suit to recover a horse alleged to have been wrongfully taken and detained by the defendant, he answered, 1st, property in himself; 2d, in a third person; 3d, denial. *Held*, that a verdict, "We the jury find for the plaintiff, find the

¹ Williams v. Porter, 41 Wis. 423.

² Hall v. Jenness, 6 Kan. 356.

³ Smith v. Dodge, 37 Mich. 354; Lamberton v. Foote, 1 Doug. (Mich). 102.

⁴ Jarrard v. Harper, 42 Ill. 457.

⁵ Degering v. Flick, 14 Neb. 448 (16 N. W. 824).

⁶ Coit v. Waples, 1 Minn. 134.

⁷ Ramsey v. Waters, 1 Mo. 406.

⁸ Western, &c., v. Walker, 2 Iowa, 504.

"property in the horse to be in him, and that he is entitled "to possession and the value of the horse, \$125," sufficiently covered all the issues in the case.¹ A verdict that the plaintiff recover the property, and one cent damages for detention thereof, is good.² A general finding for the plaintiff embraces an allegation of ownership in the complaint.³

§ 1069. **Illustrations of verdicts held bad.** But a finding in these words, "We, the jury, find that the plaintiff had "a right to replevy the mill," amounts to no more than a conclusion of law, which the jury could not decide, and will not authorize a judgment for the possession of the property.⁴ Finding the "issues" for the defendant is not finding whether he had the right of property or the right of possession. Nor is it finding the value of the property or the value of possession, as required by the statute, and such finding is insufficient to support a judgment in a direct proceeding challenging the same.⁵ "We find the plaintiff had "a right to replevy the mill," *held*, to amount only to a conclusion of law, which the jury had no authority to make, and that it would not support a judgment.⁶ Replevin against two; denial by both; answer by A that the property was in M; by B that it was in himself; verdict "for the defendants;" *Held*, that the verdict being general and embracing all the issues, was inconsistent and bad, unless the defendants saw fit to treat it as on the denial alone, which they had a right to do.⁷ Where the verdict was "for the defendant, \$50," *held*, that judgment should be rendered on the verdict, and not for a return of the property.⁸ In replevin, the pleas

¹ Clark v. Heck, 17 Ind. 281.

² Stephens v. Scott, 13 Ind. 515.

³ Rowan v. Teague, 24 Ind. 304.

⁴ Keller v. Boatman, 49 Ind. 104.

⁵ Fulkerson v. Dinkins, 28 Mo. App. 160.

⁶ Keller v. Boatman, 49 Ind. 108.

⁷ Tardy v. Howard, 12 Ind. 404.

⁸ Hunt v. Bennett, 4 Greene (Iowa) 512. But see Heddy v. Fuller, 1 Blackf. (Ind.) 51.

were: 1st, That the defendant had not taken or detained; 2d, Property in a stranger; 3d, Property in defendant. Plaintiff joined issue on the first plea and replied to the second and third, property in himself. Verdict, "We find the "property to be in the plaintiff;" *Held*, that this verdict did not authorize a judgment for plaintiff, as it was not a finding that the horse had been taken or detained by defendant.¹ In Indiana a verdict which finds for plaintiff, but fails to find that defendant wrongfully detained the property, is fatally defective.²

§ 1070. A conditional verdict is always bad, as where the jury found that plaintiff was entitled to the property unless a certain chattel mortgage was paid in ten days.³ Where the jury found for the plaintiffs \$5,619.37, and in the verdict stated that this amount, less the advances and commissions, was due the plaintiff, without finding what those advances and commissions were, the verdict was uncertain, and not sufficient to sustain a judgment.⁴

§ 1071. Verdicts held bad under pleas of *non cepit*. In replevin in the *cepit*, a verdict of unjust detention does not dispose of the material issue raised by the allegation of taking, and is therefore bad.⁵ A verdict in replevin in favor of a defendant, on a plea of *non cepit* and an avowry of rent, is erroneous.⁶ Where defendant pleads *non cepit* and property in himself, and the jury find a general verdict for him, a new trial will be granted, where from the evidence it is manifest that the property was in the plaintiff, although there may be doubt whether, upon the plea of *non cepit*, the defendant ought not to recover.⁷

¹ Huff v. Gilbert, 4 Blackf. (Ind.) 19.

² Ridenour v. Beekman, 68 Ind. 236; Swain v. Roys, 4 Wis. 150.

³ Rose v. Tolly, 15 Wis. 443.

⁴ Wood v. Orser, 11 Smith (25 N. Y.) 348. See Donaldson v. Johnson, 2 Chand. (Wis.) 160.

⁵ Ronge v. Dawson, 9 Wis. 246.

⁶ Hill v. Stocking, 6 Hill (N. Y.), 277-314.

⁷ Green v. Burke, 23 Wend. (N. Y.) 490.

§ 1072. **Where the successful party claims less than a full interest, the value of his interest must be fixed.** Where the verdict is for defendant, and he claims only a lien upon or special interest in the property, the general title being in the plaintiff, it is essential that the verdict should specify the amount of defendant's interest.¹ Where a chattel mortgage or other special ownership is in issue, the plaintiff has a legal right to insist that the verdict and judgment shall determine the amount of this special interest in or lien upon the property.² Where the complaint in replevin alleged that the plaintiff was the owner and lawfully entitled to the possession, the answer, after a general denial, averred that the defendant was poundmaster, and had a lien for impounding the cow, a verdict that plaintiff was not lawfully entitled to the possession and that defendant did not unlawfully detain, but was entitled to the possession, and finding the value of the property, *held*, fatally defective in not finding who was the general owner, and the value of defendant's special property.³ Where it appears that the party recovering has only a limited or special interest in the goods, the court or jury should assess only the value of such special interest.⁴ When a return of the property may be awarded as an alternative, with judgment for its value, then and then only the interest of the successful party should be ascertained, by fixing the value of his special property, which is to be the limit of such judgment. In replevin where plaintiff, claiming as mortgagee, has acquired and retains possession by giving the statutory bond, a verdict in his favor finding him

¹ *Farmers, &c., v. St. Clair*, 34 Mich. 518.

² *Burke v. Birchard*, 47 Wis. 35 (1 N. W. 351); *Booth v. Ableman*, 20 Wis. 21.

³ *Warner v. Hunt*, 30 Wis. 200; *Child v. Child*, 13 Wis. 19; *Appleton v. Barrett*, 22 Wis. 568.

⁴ *Gaynor v. Blewitt*, 69 Wis. 582 (34 N. W. 725); *Booth v. Ableman*, 20 Wis. 21; *Battis v. Hamlin*, 22 Wis. 669; *Warner v. Hunt*, 30 Wis. 200; *Burke v. Birchard*, 47 Wis. 35 (1 N. W. 351); *Smith v. Phillips*, 47 Wis. 203 (2 N. W. 285); *Woodruff v. King*, 47 Wis. 262 (2 N. W. 452). *Single v. Barnard*, 29 Wis. 463.

entitled to the possession, need not determine the value of his special interest.¹ Where the defendant only claims a special property in the goods, and the value of said special property is within the value of the goods, as proved at the trial, it is not necessary that the court should find the general value of the goods.²

§ 1073. **The same—Illustrations.** A finding in replevin that defendant did not unlawfully detain the property, that he had a lien on or special property in the same, to the amount specified, and that the plaintiff was the general owner, subject to defendant's lien, is sufficient in the absence of objection.³ A finding that plaintiff was the general owner and that defendant had a lien to the amount of his levy, is insufficient where the interests of the parties are conflicting. The verdict must always be full enough to enable the court to enter a proper judgment.⁴ Where the answer was a general denial, and that defendant, a sheriff, held by virtue of an execution, on verdict for defendant to the amount of his execution, *held*, that it was unnecessary to find the general ownership or value of the property.⁵ A finding that a plaintiff in replevin, at the time the defendants took away the property in question, held valid chattel mortgages upon it on which payments were in default, would entitle him to prevail, in the absence of any finding that the defendants stood in any relations to the parties to the mortgages such as qualified them to assail these securities.⁶ In replevin by a pledgee against an officer who had seized and held the property on an execution against the pledgor, the jury found that the plaintiff was entitled to the property, its value, the value of plaintiff's interest and nominal damages for its detention. *Held*, that the verdict disposes of all the material

¹ Woodruff v. King, 47 Wis. 261 (2 N. W. 452).

² Earle v. Burch, 21 Neb. 702 (33 N. W. 254).

³ Moore v. Vrooman, 32 Mich. 526.

⁴ Alderman v. Manchester, 49 Mich. 48 (12 N. W. 905).

⁵ Single v. Barnard, 29 Wis. 463.

⁶ Hendrickson v. Waker, 32 Mich. 68.

issues and is sufficient.¹ A verdict which finds the right of possession in defendant and the value of the property, but does not find the value of defendant's right of possession, is fatally defective, and no judgment can be entered thereon as if defendant was not the owner but only had a right of possession; the value of the property is immaterial, the value of his right of possession is the material thing.² Where the plaintiff has possession of the property, verdict that "We, the jury, find for the plaintiff," is sufficient.³ A verdict which finds for the defendant, the value of defendant's interest and his damages for the wrongful detention, is sufficient and will support a judgment.⁴ Where the petition alleged the value of the property and that the plaintiff was the absolute owner, a verdict, "We, the jury, find for the plaintiff," held sufficient where followed by judgment.⁵

§ 1074. **Verdict for damages not essential.** While damage is not the prime object of replevin, it is still a very important part,⁶ and under the rule that all the issues must be passed upon, it would seem that a verdict which failed to pass upon so important an issue could hardly stand.⁷ But in a well considered case, the supreme court of New Hampshire overrule or limit the case last cited, and hold that a verdict for plaintiff upon a question of title will not be set aside because the jury did not find damages.⁸ Where the damages are only nominal, in many states they are, as a

¹ *Hass v. Prescott*, 38 Wis. 146.

² *Welton v. Beltezore*, 17 Neb. 399 (23 N. W. 1).

³ *Garth v. Caldwell*, 72 Mo. 622.

⁴ *Connely v. Edgerton*, 22 Neb. 83 (34 N. W. 76).

⁵ *Newlein v. Reed*, 30 Iowa, 496. This ruling under the following statute: "the judgment shall determine which party is entitled to the possession of the property, and shall designate his right therein, and if such party have not the possession thereof, shall also determine the value of the right of such party." Rev. § 3562.

⁶ *Buckley v. Buckley*, 12 Nev. 423; *Faget v. Brayton*, 2 H. & J. (Md.) 350.

⁷ *Kendall v. Fitts*, 2 Foster, (N. H.) 9.

⁸ *McKean v. Cutler*, 48 N. H. 372.

matter of law, given to the successful party, and under such practice the assessment of them is not so material unless more than nominal damages are claimed.

§ 1075. **Court may compel a finding of nominal damages**, but nothing more can be given except upon proof. The verdict will be set aside where the damages are excessive under the proof. Damages other than nominal must always be assessed by a jury unless waived of record.¹ Although in replevin a finding of any damages, actual or nominal, is not necessary to sustain a verdict and judgment in plaintiff's favor, yet where the jury has refused to find any damages, it was not error for the court to peremptorily direct them to find a nominal sum of six cents. After verdict recorded it is too late to ask that the jury be polled.² In replevin a verdict will be set aside if damages for detention are assessed in favor of the defendant, without proof of damages other than the value of the property, and the fact and time of the replevin.³ Where the verdict is in defendant's favor he may waive a finding for damages and have judgment entered, and the plaintiff cannot complain.⁴

§ 1076. **A verdict may be sufficient to support a judgment of return, but not for value.** A verdict that plaintiff owned the property, and that defendants wrongfully detained it, is sufficient for a judgment for a return, but not for value or damages, and if a return is not obtained the judgment is unavailing.⁵ And where plaintiff sought to recover possession of the property, claiming to be the exclusive owner thereof, and the defendant pleaded property in himself, the proof showing that he owned the property jointly with the plaintiff, *held*, that a verdict for defendant on such issue did not determine judicially that the property was that of defendant, exclusively, and that such finding did not affect

¹ *Pearsons v. Eaton*, 18 Mich. 80.

² *Hight v. Johnson*, 28 Wis. 72.

³ *Mann v. Grove*, 4 Heis. (Tenn.) 403.

⁴ *Ritchie v. Schenck*, 7 Kan. 170.

⁵ *Hammond v. Morgan*, 101 N. Y. 179 (4 N. E. 323).

plaintiff's right to recover the undivided half, but that it was no error for the court to award a return of the property to the defendant. If the property was in fact partnership property the possession of either was lawful.¹ In replevin of a distress the verdict should, if for the defendant, find the value of the goods and the rent in arrear, but if it fail to do this and merely find for the defendant, it will support a judgment for a return.²

§ 1077. **Form of, where defense is fraud in vendee's title.** Where plaintiff in replevin against an officer holding under execution claimed title by purchase from his father, the execution defendant, and the officer answered fraud in transfer from father to son, if the jury found this transfer fraudulent their verdict should have been "We, the jury, find the issues for the defendant, and that the property was the property of the defendant in execution."³ The form of verdict will depend much upon the statutes of each state.

§ 1078. **General forms of verdict.** We, the jury, find for the plaintiff, that he was and is the owner and entitled to the possession of the property described in the affidavit, which was wrongfully detained by defendant, that said property is of the value of \$——, and we assess plaintiff's damages at \$——.

We, the jury, find that, at the commencement of this action, the plaintiff had a special right of possession in the following property in controversy [describe], that it was wrongfully detained by defendant, that it is of the value of \$——, that the value of plaintiff's possession is \$——, and we assess plaintiff's damages at \$——. We also find that the defendant was and is entitled to the possession of the following property in controversy [describe], that it is

¹ Reynolds v. McCormick, 62 Ill. 412.

² Cather v. Bray, 86 Pa. 52.

³ Gilligan v. Stevens, 4 Bradw. (Ill.) 401; Hanford v. Obrecht, 49 Ill. 146.

of the value of \$———, or simply say, for the remainder of the property we find for the defendant.¹

§ 1079. **A verdict may be returned on Sunday.** Where a replevin trial is completed by the introduction of testimony, the arguments of counsel, and the charge of the court, and the case has passed to the jury for consideration before midnight of Saturday, the fact that they do not finally arrive at and return their verdict until sometime in the early hours of Sunday morning does not vitiate the entire proceedings and compel a retrial.²

§ 1080. **Or on a legal holiday.** On a return of the verdict in replevin, if the justice do not at once enter up judgment, he loses jurisdiction, and the fact that the jury did not return the verdict until the morning of a legal holiday did not relieve the justice from this duty.³

§ 1081. **Separate defendants are entitled to separate verdicts.** Where there are several defendants all may not be guilty of the unlawful detention, and the verdict should specify which ones are guilty and which not.* Or one may be guilty of taking a part of the property, and another another part, and the jury should be specific on these points in their verdict,⁵ where several unite as plaintiffs verdict

¹ Thornton on Juries, 304.

² Stone v. Bird, 16 Kan. 488. In the following cases, verdicts returned on Sunday were held good: Heller v. English, 4 Strobhart, S. C. 486; Huide, Koper v. Cotton, 3 Watts, 56; Commonwealth v. Marrow, 3 Brewster, 402; Cory v. Silcox, 5 Ind. 370; Houghtailing v. Osborne, 15 Johns. 119; Baiter v. The People, 3 Gilman, 385; Webber v. Merrill, 34 N. H. 202; True v. Plumley, 36 Me. 466. Held not good in Bass v. Irvin, 49 Ga. 436, and Davis v. Fish, 1 G. Green. (Iowa) 410.

³ Smith v. Bahr, 62 Wis. 244 (22 N. W. 438). The statute of Wisconsin provides that the justice, on the receipt of the verdict, shall immediately enter an order in his docket disposing of the property according to the verdict, and judgment for damages and costs, §§ 3662, 3742.

⁴ Carothers v. Van Hagan, 2 G. Green. (Iowa) 481; Hotchkiss v. Ashley, 44 Vt. 199; Wilderman v. Sandusky, 15 Ill. 60; Dart v. Horn, 20 Ill. 213.

⁵ Simpson v. Perry, 9 Ga. 508; Walker v. Hunter, 5 Cranch. C. C. 462.

and judgment may be in favor of one plaintiff and against the others.¹

§ 1082. **Finding partly for defendant and partly for plaintiff, proper when.** In an action of replevin it is proper for the jury to find for the plaintiff for some of the goods, and as to the rest for the defendant, and judgment may be entered upon such a verdict.² In an action of replevin each party may be an actor. If the goods have been replevied and the plaintiff prevails he is entitled to nominal damages and also his costs; but if the defendant prevails he is entitled to a return of the goods or to damages, to the value of them and also his costs. If a verdict be found that a part of the goods replevied were the property of the plaintiff and a part were not, each party must be considered as prevailing to that extent respectively, and the verdict must so be in favor of each of them respectively; and as each party has judgment upon it for his damages, either nominal or substantial, he is so far a prevailing party and must also have his costs.³ Where defendant pleaded (1) property in himself and not in plaintiff, (2) property in a stranger which he had levied on, and held as an officer under a writ against the stranger, it was *held* that the jury might find that a part of the property belonged to the plaintiff, and assess damages for its detention, and that part of the property did not belong to plaintiff and assess damages to the defendant.⁴

§ 1083. **Each party may submit special issues to the jury** with the consent of the court, but they should be confined to issues belonging to the replevin action. And it is

¹ Hamilton v. Browning, 94 Ind. 242.

² Wright v. Funck, 94 Pa. 26; Pratt v. Tucker, 67 Ill. 346; Hotchkiss v. Ashley, 44 Vt. 195; Edelen v. Thompson, 2 Har. & G. (Md.) 32; Williams v. Beede, 15 N. H. 483; Brown v. Smith, 1 N. H. 36; Powell v. Hinsdale, 5 Mass. 343. Poor v. Woodburn, 25 Vt. 235; Wright v. Mathews, 2 Blackf. (Ind.) 187; Dowell v. Richardson, 10 Ind. 573; O'Keef v. Kellogg, 15 Ill. 347.

³ Knowles v. Pierce, 5 Houst. 178.

⁴ Williams v. Beede, 15 N. H. 483.

in the power of the court to compel the jury to find upon the issues so submitted, and if they fail or neglect to so find the general verdict may be set aside. It is discretionary with the court whether or not a jury be required to make special findings outside of the usual findings in a replevin suit.¹

§ 1084. **Separate issues must not be united by the verdict.** The issue in replevin is to be determined by the jury upon the facts as they were at the beginning of the suit;² and the jury should not unite in one sum damages for the taking and the value of the property, but each should be found separately.³ It is impossible to enter a proper judgment upon such a verdict,⁴ but the presumption is in favor of the verdict; and where there were two causes of action, one proper and the other not, and the jury found damages without saying upon which cause of action, it was construed as being awarded on the proper cause of action.⁵

§ 1085. **A verdict which is inconsistent with itself can not stand.** Where the jury found that the son held under an unexpired lease, and found generally for the father as lessor, who was plaintiff in replevin, *held*, that it negatived plaintiff's right of possession, and judgment for him reversed.⁶ A finding in replevin that plaintiff has the general property, but that defendant did not unlawfully detain them, is contradictory, and cannot sustain a judgment in a case where it is impossible that a special property should co-exist with the general ownership.⁷ If there be a material repugnancy in the verdict, it is not competent for the court to decide which is intended to stand by the jury. This would be

¹ *Singer Mfg. Co. v. Sammons*, 49 Wis. 316 (5 N. W. 788).

² *Cass v. Gunnison*, 58 Mich. 108 (25 N. W. 52).

³ *Nashville Ins. Co. v. Alexander*, 10 Hump. 383; *Sayers v. Holmes*, 2 Cold. (Tenn.) 259.

⁴ *Carson v. Applegarth*, 6 Nev. 188.

⁵ *Ellis v. Culver*, 1 Har. (Del.) 76.

⁶ *Nottingham v. Vincent*, 50 Mich. 461 (15 N. W. 551).

⁷ *Rodman v. Nathan*, 45 Mich. 607 (8 N. W. 562).

a substitution of the court's judgment for that of the jury.¹ Where the jury assessed the value of the goods, and stated that this was to be reduced by a factor's advances and charges, which they did not assess, *held*, this was not a verdict on which judgment could be rendered.² A general verdict for defendant, upon different and inconsistent pleas, is bad.³

¹ *Hewson v. Saffin*, 7 Ham. (Ohio pt. II.) 232; *Barrett v. Hall*, 1 Mass. 447; *Tardy v. Howard*, 12 Ind. 404.

² *Wood v. Orser*, 25 N. Y. 348.

³ *Hewson v. Saffin*, 7 Ham. (Ohio Part II.) 232; *Donaldson v. Johnson*, 2 Chand. (Wis.) 160.

CHAPTER XXXV.

JUDGMENT.

	Section.		Section.
The judgment must follow the verdict	1086	One good count will support a judgment	1103
The same—Damages must be proved	1087	When alternative judgment necessary	1104
The court may modify the judgment as to damages .	1088	A judgment in replevin should be in the alternative	1105
Judgment may be made to conform to verdict by motion	1089	When alternative judgment not necessary	1106
How corrected <i>nunc pro tunc</i> .	1090	Where bond not given alternative judgment not necessary	1107
May be amended saving the rights of third parties—Notice	1091	Successful party may waive right to an alternative judgment	1108
Error in entering judgment, how corrected	1092	How this election made . .	1109
The proper entry of judgment may be compelled by mandamus	1093	Where property in hands of the court, judgment for delivery alone is sufficient .	1110
Power of court over judgment—Fraud	1094	Judgment for a return is necessary where the successful party is not in possession .	1111
Jurisdiction of inferior courts	1095	Judgment for a return is a matter of right	1112
Judgment must be confined to matter properly arising in the replevin suit . .	1096	Insolvency of successful party does not change his right to a return . . .	1113
It is error to render judgment for more than is claimed .	1097	Return can only be awarded against one in possession .	1114
The judgment must be certain and definite . . .	1098	The same	1115
Must describe the property with certainty	1099	Exception in case of fraud .	1116
A judgment which can be made certain by reference to the pleadings is good .	1100	Where plaintiff fails in his action for any reason restitution should be awarded .	1117
The judgment must speak upon all the issues involved .	1101	Judgment of return should follow dismissal	1118
The judgment must speak as to all the parties . . .	1102	The same—A contrary rule .	1119
		An action of replevin cannot	

Section.	Section.
be dismissed until the property is disposed of . . . 1120	Where defendant has but a limited interest . . . 1136
Judgment may be rendered for a return of part of the property and damages for the part not taken . . . 1121	An officer is entitled to judgment of return where successful . . . 1137
Judgment of return should fix a reasonable time in which the return is to be made . . . 1122	Officer only entitled to return where he can sell . . . 1138
Where the successful party already has possession judgment for a return is not necessary . . . 1123	The same—Exception . . . 1139
Nor if he has acquired possession during the litigation . . . 1124	An officer may have judgment for a sum larger than the value of the goods . . . 1140
Nor where the suit proceeds as one for damages only . . . 1125	Where the amount of the special interest is not found a return should be awarded . . . 1141
Right of property must be shown to entitle a party to a return . . . 1126	A joint judgment can only be rendered . . . 1142
One who disclaims all interest in the property cannot have a return . . . 1127	Joint judgment for defendants who make separate defenses . . . 1143
One who pleads property in a stranger . . . 1128	Judgment against a person not a party void . . . 1144
Where it is impossible that the property should be returned . . . 1129	Proper judgment in certain cases—Practice . . . 1145
It is error to order the return of property not in existence . . . 1130	Judgment on plea of <i>non cepit</i> and <i>non detinet</i> . . . 1146
Effect of death or destruction of property . . . 1131	An absolute money judgment is erroneous . . . 1147
The young of animals born while in litigation . . . 1132	Equities should be adjusted—Damages . . . 1148
Effect of failure to adjudge a return . . . 1133	Proper judgment for damages . . . 1149
Judgment for value is only proper where a return is awarded . . . 1134	A stipulation as to the amount of the damages will be enforced by the court . . . 1150
Where the property can be returned, the party in possession cannot complain of error in fixing the value . . . 1135	Liability and obligations of an administrator . . . 1151
	Substitution of defendants . . . 1152
	Substitution of an intervenor . . . 1153
	Surety on bond may be allowed to prosecute the suit when abandoned by his principal . . . 1154
	Judgment against the sureties . . . 1155
	Costs . . . 1156

§ 1086. **The judgment must follow the verdict and conform to it.** It cannot be broader than the verdict. If it do not cover as much ground as the verdict, it can be corrected by the court on motion. The judgment is the superstructure, the verdict the foundation, and they must agree in general form.¹ A judgment in *detinue* should follow the verdict, and should be for the property sued for *or its alternate value*, with damages for its detention to the time of the trial.² The judgment in replevin must conform to the verdict. If it is more comprehensive or identifies the property more, it is bad.³ It cannot be broader than the finding.⁴ It is the final judgment that determines the rights of the parties and the status of the property, and not the delivery under the writ.⁵ And both judgment and finding must agree with the pleadings.⁶

§ 1087. **The same—Damages must be proved.** The judgment cannot be for damages when the verdict is silent as to the damages.⁷ If the evidence do not show that the plaintiff sustained damage by reason of the detention of the property, a judgment in his favor should be for possession alone, and not for possession and damages.⁸ It is irregular in replevin to award judgment for six cents damages for the wrongful taking and detention in the absence of any finding as to such damages, but it is not reversible error.⁹ Where the action was replevin in the *detinet*, and the court found the value of the property as \$600, that the plaintiff was its owner and entitled to its possession, and that defendant de-

¹ *Poor v. Woodburn*, 25 Vt. 234; *Corn Exch. Bank v. Blye*, 7 N. Y. S. 434.

² *Greene v. Lewis*, 85 Ala. 221 (4 So. 740).

³ *Holliday v. McKinne*, 22 Fla. 153.

⁴ *Leighton v. Stuart*, 10 Neb. 224 (4 N. W. 1051).

⁵ *Moore v. Herron*, 17 Neb. 697 (24 N. W. 425).

⁶ *Wolfe v. Blue*, 5 Blackf. (Ind.) 153.

⁷ *Black v. Winterstein*, 6 Neb. 224; *Corn Exch. Bank v. Blye*, 7 N. Y. S. 434.

⁸ *Wangler v. Franklin*, 70 Mo. 659.

⁹ *Ries v. Delleß*, 45 Wis. 663.

tained it from him, and then gave judgment in favor of the plaintiff for the property, or for the sum of \$176.20, at the option of the defendant, *Held* to be error; first, because it gave the defendant the option to retain the property by paying a named sum; and second, because the sum to be paid was less than the value as found.¹

§ 1088. **The court may modify the judgment as to damages.** A judgment in replevin may, in the sound discretion of the court, be modified as to the damages when the evidence is not clear and complete as to certain articles.²

§ 1089. **Judgment may be made to conform to verdict by motion.** A judgment for the plaintiff in an action of replevin should be in the alternative—that the plaintiff recover the possession of the property or the value thereof, in case a delivery cannot be had, and for damages for the detention; but where the finding contains all the requisites for the rendering of a proper judgment for the plaintiff, and the judgment is not in the form so prescribed, being simply for the value of the property and damages, it should be corrected by motion to conform it to the finding.³

§ 1090. **How corrected nunc pro tunc.** The fact that a judgment is not such a one as the statute authorizes will not warrant the entering of a proper one *nunc pro tunc* at a subsequent term, without proof that the judgment entered by the clerk is not the one rendered by the court.⁴ This is on the theory that the act of the court at the same term could prejudice no one, as all parties are supposed to be in court the trial term.

§ 1091. **May be amended—Saving the rights of third parties—Notice.** In an action of replevin, where the defendant has a verdict in the alternative for a return of the

¹ *Cummings v. Stewart*, 42 Cal. 230.

² *Ladd v. Newell*, 34 Minn. 107 (24 N. W. 366).

³ *Thompson v. Eagleton*, 33 Ind. 300; *Hebel v. Scott*, 36 Ind. 226; *Corn Exch. Bank v. Blye*, 7 N. Y. S. 434.

⁴ *Woolridge v. Quinn*, 70 Mo. 370. See *Freeman on Judgts.*, Ch. IV.

replevied property or for its value as assessed by the jury, in case a return cannot be had, but the clerk erroneously enters an absolute money judgment for the defendant, the district court may, in its discretion, amend the judgment so that it shall conform to the verdict. Such an amendment is inoperative to affect the rights of third persons not parties to the suit, but a clause saving such rights should be inserted in the order allowing it. The application for such amendment being made more than two years after the entry of judgment, notice should be served upon the plaintiff; service on his attorney in the suit is not sufficient. One who, on behalf of the plaintiff, executes the undertaking required in an action of replevin, and after judgment for defendant in that action successfully defends, in another state, a suit upon the undertaking, on the ground that the erroneous entry of judgment in the replevin suit enlarged his liability, and discharged him from liability on his undertaking, cannot afterwards contest a motion by defendant for the amendment of the judgment in the replevin suit.¹

§ 1092. **Error in entering judgment, how corrected.** The proper way to correct an error in entering a judgment in replevin is by motion in the court in which rendered, and not by appeal.² On verdict for defendant, when property has been delivered to plaintiff, a judgment for a return should be entered, and if the clerk enter up judgment for costs only, the court will on motion correct it.³

§ 1093. **Proper entry of judgment may be compelled by mandamus.** Where a judgment has been erroneously entered in replevin, mandamus will lie to compel the entry of a proper judgment, unless such change will prejudice the rights of strangers.⁴

¹ Berthold v. Fox, 21 Minn. 51.

² Young v. Atwood, 5 Hun. 234; Corn Exch. Bank v. Blye, 7 N. Y. S. 434.

³ Sumner v. Cook, 12 Kan. 162.

⁴ Frederick v. Mecosta Circuit Judge, 52 Mich. 529 (18 N. W. 343).

§ 1094. **Power of court over judgment—Fraud.** The jurisdiction of a court to render judgment in a cause is co-extensive with its authority to inquire into the facts.¹ And so its control over its own judgments, within the time limited by statute, is absolute, and where it is made to appear that a judgment was obtained by a corrupt agreement it will be set aside.²

§ 1095. **Jurisdiction of inferior courts.** In Michigan, where the right to bring replevin in justice court is limited to property below \$100 in value as shown by the affidavit, still if defendant recover, damages may be assessed in his favor up to \$500, the general jurisdiction of the justice.³ Where the value of the property or the damages claimed are beyond the jurisdiction of the justice, and plaintiff dismisses his action, the justice cannot order a return, but render judgment for costs only, leaving the defendant to seek his remedy elsewhere.⁴ Or where the property is not taken, and the judgment for value is beyond the jurisdiction of the justice, the excess may be remitted, the justice may enter and sustain the *remittitur*, and enter up judgment for the rest, not exceeding his jurisdiction, and it will be upheld.⁵ The value as fixed in the affidavit is usually conclusive on the subject of jurisdiction.⁶ Jurisdiction of a replevin action may be acquired by consent of parties.⁷ Where an action of

¹ Fensier v. Lammon, 6 Nev. 209.

² Fries v. Porch, 49 Iowa, 351. In this case a city marshal, who had seized certain liquors for violation of law and from whom they had been replevied consented, for a money consideration, to judgment against him in the replevin suit. This judgment was set aside as a fraud on the rights of the state, the real party in interest. See Freeman on judgments.

³ Chilson v. Jennison, 60 Mich. 235 (26 N. W. 859).

⁴ Jacobs v. Parker, 7 Bax. 434. See Hood v. Spaeth (N. J.), 16 A. 163.

⁵ Hill v. Wilkinson, 25 Neb. 103 (41 N. W. 134). The value was found to be \$260, \$60 above the appraisal and \$60 above the jurisdiction of the court. \$60 was remitted and judgment for balance upheld.

⁶ Gottschalk v. Klinger, 33 Mo. App. 410.

⁷ Guyon v. Rooney, 6 N. Y. S. 99.

replevin is commenced before a justice of the peace by a resident of the county, against a non-resident, and the defendant is properly served with summons in the county where the action is commenced, but the property is not taken, and the property has never been wrongfully detained in the county where the action is commenced, but has been and is wrongfully detained by the defendant in the county where the defendant resides, the court has jurisdiction to hear and determine the case as one for damages only.¹

§ 1096. **Judgment must be confined to matters properly arising in the replevin suit.** In replevin by a mortgagee, if the finding be in his favor, the court should not order him to sell the property, but simply turn the property over to him on his mortgage, and not as a commissioner of the court.²

§ 1097. **It is error to render judgment for more than is claimed in the complaint or affidavit, and this error is not cured by an offer to remit, as the pleadings are always amendable; if the plaintiff want more than at first claimed, he should amend.**³

§ 1098. **The judgment must be certain and definite.** It is error to render a judgment in replevin subject to an equitable condition, as to provide that it shall be a judgment unless a certain mortgage is paid within a certain time,⁴ or to attach any other condition not provided for by the statute. The essential part of a judgment is wanting if it be not definite and certain.

§ 1099. **Must describe the property with certainty.** A judgment describing the property to be restored as "buck-wheat, valued at \$365.75," is too indefinite to be good, especially where there is nothing in the pleadings to make the description more definite.⁵ So a judgment and record

¹ *Huckell v. McCoy*, 38 Kan. 53 (15 P. 870).

² *Marks v. McGehn*, 35 Ark. 217.

³ *Tyner v. Hays*, 37 Ark. 599.

⁴ *Rose v. Tolly*, 15 Wis. 443.

⁵ *Welch v. Smith*, 45 Cal. 230.

as follows: "A trial was had and a judgment rendered "against the defendant for one cow," it was *held* not sufficient; it did not find the value or damages, or that plaintiff was entitled to possession, or that defendant wrongfully detained; it would not bar another action for the same cow.¹ The judgment was for the recovery of five horses out of six, and one wagon out of two; the horse and wagon not recovered were not sufficiently identified to enable the sheriff to separate them from the rest. *Held*, a sufficient ground for the reversal of the judgment.² A judgment decreeing a return of the property, or in default thereof the recovery of the assessed value thereof, is in due form.³ A judgment in replevin which does not allow of a return of the property is defective.⁴ Verdict, "We, the jury, find the defendant "guilty," it was *held* equivalent to a finding of property in the plaintiff.⁵

§ 1100. A judgment which can be made certain by reference to the pleadings is good, but such practice is not to be commended. In a judgment in replevin, a reference in the judgment to the findings, and in the findings to the complaint for a description of the property, is inexcusably circuitous, but the description is not uncertain. *Certum est quod certum reddi potest*. Such reference is to the amended complaint if there is one.⁶ Thus, in replevin for cattle, a judgment for a sum of money equal to the number of cattle multiplied by their value per head, as found by the evidence, and providing for their return to plaintiff, to be credited on the judgment at the same value per head, is in effect a judgment for a return or the value.⁷ A judgment which

¹ *Beemis v. Wylie*, 19 Wis. 319.

² *Carrier v. Carrier*, 71 Wis. 111 (36 N. W. 626).

³ *Heffner v. Reed*, 3 Grant Cas. (Pa.) 245; *Huron v. Beckwith*, 1 Wis. 17.

⁴ *Fugate v. Stapleton*, 6 Bax. (Tenn.) 321.

⁵ *Jarrard v. Harper*, 42 Ill. 457.

⁶ *Kelly v. McKibben*, 54 Cal. 192. See *White & Sons v. Woodruff*, 25 Neb. 806 (41 N. W. 781-5).

⁷ *Lang v. Daugherty* (Texas), 12 S. W. 29.

adjudges that the plaintiff do recover the possession "of the "property in the complaint herein described and filed," where the complaint sufficiently described the property sought to be recovered, is not void for want of certainty.¹ A plaintiff cannot complain of a judgment in the following form: "Judgment in favor of defendant against the plaintiff for possession of the personal property mentioned in "plaintiff's affidavit, to-wit: one buggy, wagon, with costs."² A judgment in replevin will not be reversed because it does not specifically describe all the property in controversy where the record, taken as a whole, sufficiently points it out.³

§ 1101. **The judgment must speak upon all the issues involved.** Where one issue predominates and all others are subordinate, a judgment upon the main issue carries with it all the others. That is, it is presumed that the court decided them in accordance with the general judgment; but the better practice is to make the judgment full and explicit, leaving nothing to be inferred or guessed at. This is the imperative duty of the court.

§ 1102. **The judgment must speak as to all the parties.** A final judgment against part of the defendants will not dispose of the case as to the others, and is not sufficient.⁴ The claim of plaintiff may be true as to some of the defendants and false as to some; the judgment should settle this fully.⁵ One may be guilty of the wrongful taking, the others not; the judgment should be against those guilty and discharge those not guilty;⁶ or if defendants prevail a return may be

¹ Hogue v. Fanning, 73 Cal. 54 (14 P. 560). See Hunter v. Hoole, 17 Cal. 420.

² Haight v. Haight, 7 Hun. (N. Y.) 87.

³ Coleman v. Reel, 75 Iowa, 304 (39 N. W. 510).

⁴ Barbour v. White, 37 Ill. 164. See Dow v. Rattle, 12 Ill. 373; Rose v. Tolly, 15 Wis. 444; Perry v. Lewis, 49 Miss. 443.

⁵ Mercer v. James, 6 Neb. 406.

⁶ Carothers v. Van Hagan, 2 G. Green. (Iowa) 481; Church v. De Wolf, 2 Root (Conn.), 282; Ouly v. Dickinson, 5 Cold. (Tenn.) 486; Wakeman v. Lindsay, 19 L. J. Q. B. 166; Addison v. Overend, 6 Term R. 357 and 767.

awarded to one of the defendants and not to the others;¹ but judgment for damages is usually against all the defendants.²

§ 1103. **One good count will support a judgment.** Where a defendant in replevin succeeds on one avowry he is entitled to judgment though he plead others which are bad.³ After a verdict in replevin it is too late to object that some of the issues were immaterial if there is any one good.⁴

§ 1104. **When alternative judgment necessary.** An alternative judgment should be entered in all cases where the general property is in one party and the special property in another. Thus, where the plaintiff gives bond and obtains possession of the property, and fails to prosecute his action with effect, and the defendant, as against the plaintiff, has only a special interest in the property, by way of lien, the judgment in favor of the defendant should be only for the value of his interest, or for a return of the property until such value should be paid, at the defendant's election.⁵ And when the general property is in the plaintiff, and the defendant shows a special property, consisting of a right to hold the property as against the plaintiff only for a certain sum of money, as where the defendant showed special property by a levy of *ft. fa* against the plaintiff, or where defendant holds the property of the plaintiff but by virtue of some lien as carrier, warehouseman, or otherwise,⁶ an alternative judgment should always be given.

§ 1105. **A judgment in replevin should be in the alternative** where it is against the party having the possession. Where the party who recovers in an action of replevin is not the party in possession under the replevin proceedings,

¹ Woodburn v. Chamberlain, 17 Barb. 452.

² Clark v. Bales, 15 Ark. 452; Laymon v. Hendrix, 1 Ala. 212; Simpson v. Perry, 9 Ga. 508; Fuller v. Chamberlain, 11 Met. 503.

³ Nichols v. Dusenbury, 2 N. Y. (2 Comst.) 283.

⁴ Gaines v. Tibbs, 6 Dana (Ky.), 143.

⁵ Dilworth v. McKelvy, 30 Mo. 149.

⁶ Lamping v. Payne, 83 Ill. 463.

the judgment should be in the alternative.¹ Judgment in replevin, when against the party in possession, should be in the alternative, and it is error not to enter the judgment in that form; but where such judgment is for a return only, it can be enforced by execution, and the defect will be disregarded unless it affect substantial rights or operate prejudicially to the interests of a party.² In an action of replevin the proper judgment, when the result of the trial is in favor of the party dispossessed of the property, is one allowing to the successful party an execution for the return of the specific property, or in case that cannot be found, for its value.³ In an action of replevin the judgment must be for the return of the property, and an alternative judgment for its value if not returned. An absolute judgment for its value, not allowing defendant to satisfy the judgment by return of the property with costs and damages, is erroneous.⁴

§ 1106. **When alternative judgment not necessary.** Where plaintiff was put in possession under the writ, and before trial sold the property, and on a verdict for defendant he elected to take a judgment for value, an alternative judgment

¹ *Sherman v. Clark*, 24 Minn. 38; *Council v. Averett*, 90 N. C. 168; *Robbins v. Killibrew*, 95 N. C. 19; *Jetton v. Smead*, 29 Ark. 372; *Hauf v. Ford*, 57 Ark. 544; *Rowark v. Lee*, 14 Ark. 425; *Ward v. Masterson*, 10 Kan. 77; *Sumner v. Cook*, 12 Kan. 162; *Hall v. Jenness*, 6 Kan. 356; *Copeland v. Majors*, 9 Kan. 104; *Phillips v. Harras*, 3 J. J. Narsh. (Ky.) 121; *Smith v. Coolbaugh*, 19 Wis. 106; *Lee v. Hastings*, 13 Neb. 508 (14 N. W. 476); *Hooker v. Hammill*, 7 Neb. 231; *Marix v. Franke*, 9 Kan. 132; *Clary v. Roland*, 24 Cal. 149; *Mason v. Richards*, 12 Iowa, 73; *Eslava v. Dillihunt*, 46 Ala. 702; *Jansen v. Effey*, 10 Iowa, 227; *Bales v. Scott*, 26 Ind. 202; *Dwight v. Enos*, 9 N. Y. (5 Seld.) 470; *Easton v. Worthington*, 5 S. & R. 133; *Pratt v. Donovan*, 10 Wis. 379; *Dows v. Rush*, 28 Barb. (N. Y.) 157; *Fitzhugh v. Wiman*, 9 N. Y. (5 Seld.) 559; *Anderson v. Tyson*, 14 Miss. (6 S. & M.) 244; *Lambert v. McFarland*, 2 Nev. 58; *Rowark v. Lee*, 14 Ark. 425.

² *Marix v. Franke*, 9 Kan. 132.

³ *Clark v. Warner*, 32 Iowa, 219.

⁴ *Lambert v. McFarland*, 2 Neb. 58; *Fitzhugh v. Wiman*, 5 Shelden (9 N. Y.) 559; *Wallace v. Hilliard*, 7 Wis. 628; *Carson v. Applegarth*, 6 Nev. 187.

is not necessary.¹ Where, after the commencement of the suit in replevin, defendant as sheriff sold the property and plaintiff bought it and was in possession of it at the trial, on a finding in his favor, an alternative judgment is not necessary, but he should have judgment for the possession and for what it cost him at the sale as his damages.² A judgment in replevin may be good though not expressed in the alternative.³ Where plaintiff brought replevin but did not give the bond, but suit proceeded and judgment as follows was rendered on a finding for plaintiff, "It is therefore considered and adjudged by me that the plaintiff have the immediate possession of said property, and in default of the recovery of such possession he recover from defendant the sum of, etc.," *held*, to be an election by plaintiff to take the property, and where after tender of return it was destroyed it was plaintiff's loss, and collection of the money judgment should be enjoined.⁴ Where a replevin case was decided against a plaintiff on demurrer, on the ground of no jurisdiction, *held*, that defendant did not have his election to take the property or judgment for its value, but must take the property.⁵

§ 1107. **Where bond not given—Alternative judgment not necessary.** If in an action of replevin the plaintiff does not give bond and does not procure a delivery of the property to him, and on the trial elects to proceed for the value and not for a return, without objection by the defendant, he is entitled, if successful, to an absolute judgment for the value.⁶ And where no bond was given and no return made, *held*, that the court had no jurisdiction and could make no order,

¹ *White v. Graves*, 68 Mo. 218; *Wooldridge v. Quinn*, 70 Mo. 370.

² *Leonard v. Maginnis*, 34 Minn. 506 (26 N. W. 733).

³ *Boly v. Griswold*, 20 Wallace (U. S. C. Ct.), 486; *Sweeney v. Lomme*, 22 Wallace, 208.

⁴ *Oskaloosa v. Nelson*, 54 Iowa, 519 (6 N. W. 718).

⁵ *Williams v. Chapman*, 60 Iowa, 57 (14 N. W. 89). This holds that § 3241 of the Iowa code, which provides that the person found to be entitled to the property may, at his option, have the specific delivery or judgment for the value, applies only to cases tried on the merits.

⁶ *Tuckwood v. Hanthorn*, 67 Wis. 326 (30 N. W. 705).

and that the plaintiff in the pretended action of replevin and the officer holding the illegal writ were liable as trespassers and not in the replevin (?) action.¹

§ 1108. **Successful party may waive right to an alternative judgment** and the other party cannot complain. The plaintiff may waive his right to have included in the judgment for the recovery of the property the usual alternative provision for the recovery of its value, on a finding in his favor.² If the defendant waive the taking of a personal judgment, the plaintiff cannot object.³ The statutory provision, that a judgment in favor of a defendant shall be in the alternative for a return of the property or for its value, is for the benefit of the defendant, who alone can take advantage of its omission. Anyhow, before the plaintiff could complain of its omission he must show that the property is capable of being returned,⁴ and this election may be first made when judgment is taken.⁵

§ 1109. **How this election made.** The better rule is that this waiver of right to a judgment of return is presumed where the party entitled thereto knowingly stands by and does not insist upon judgment for return, but the courts have not been uniform in their holdings on this point. Where plaintiff has taken the property and the finding is against him, defendant is entitled to a judgment for a return of the property, or he may waive this and take a judgment for its value, and this election need not be of record but may be oral or inferred from his actions.⁶ Where the statute gives defendant a right to elect whether he will have judgment for a return or the value, the record must affirmatively and dis-

¹ *Adams v. McGlinchy*, 62 Me. 533—66 Me. 474.

² *Stevens v. McMillin*, 37 Minn. 509 (35 N. W. 372); *Thompson v. Scheid*, 39 Minn. 102 (38 N. W. 801); *Morrison v. Austin*, 14 Wis. 601.

³ *Morrison v. Austin*, 14 Wis. 601; *Smith v. Coolbaugh*, 19 Wis. 107; *People v. Tripp*, 15 Mich. 518; *Williams v. Vail*, 9 Mich. 162.

⁴ *Goodman v. Kennedy*, 10 Neb. 270 (4 N. W. 987).

⁵ *High v. Johnson*, 28 Wis. 72.

⁶ *Hill v. Fellows*, 25 Ark. 11.

tinently show his election to take judgment for the value and not a return, if he so elect, otherwise the judgment should be for a return.¹

§ 1110. **Where the property is in the hands of the court, a judgment for delivery alone is sufficient.** Where the property sued for in replevin (an insurance policy) is delivered into the control of the court, there is no necessity that a verdict for the plaintiff should assess its value, so that the court can render an alternative judgment for the property or its value. The judgment should be only for delivery.²

§ 1111. **Judgment for a return is necessary where the successful party is not in possession.** In replevin for fixtures, which the officer separated from the realty but did not remove, judgment for a return is proper.³ If defendant traverse plaintiff's title, he will be, if he prevail, entitled to a judgment of return.⁴ His right, upon such an issue, to a return, is as clearly established as his right to a judgment for costs.⁵ A justice of peace may render judgment for a return of property and for damages up to the limit of his jurisdiction.⁶ It is error to adjudge a return to plaintiff of articles omitted from the verdict.⁷ Where the plaintiff has the property, it is error to render judgment against him for the value or for a return, without a trial.⁸ A judgment in replevin must be in the alternative and in the form required by the statute.⁹ A defendant who recovers a judgment in an action of replevin, where the prop-

¹ *Adams v. Champion*, 31 Mich. 233; *Wheeler v. Wilkins*, 19 Mich. 78.

² *Harris v. Harris*, 43 Ark. 535.

³ *Josslyn v. McCabe*, 46 Wis. 591.

⁴ *Timp v. Dockham*, 32 Wis. 146.

⁵ *Kaeffner v. Stratton*, 57 Me. 360; *Witham v. Witham*, 57 Me. 447.

⁶ *Zitske v. Goldberg*, 38 Wis. 216.

⁷ *Young v. Lego*, 38 Wis. 206.

⁸ *Planer v. Smith*, 40 Wis. 31.

⁹ *Berson v. Nunan*, 63 Cal. 550; *Campbell v. Jones*, 38 Cal. 507; *McCue v. Tunstead*, 66 Cal. 486 (6 P. 316); *Brichman v. Ross*, 67 Cal. 601 (8 P. 316); *Stewart v. Taylor*, 68 Cal. 5 (8 P. 605).

erty has been delivered to the plaintiff, is entitled to a judgment for a return of all the property, and if it cannot be returned, then to a judgment for the value of the whole, and it is not necessary to the validity of the judgment that the separate value of each article sued for be found by the court.¹ Where the pleas were *non cepit* and *non detinet*, property in a third person and property in defendant, verdict, "We, the jury, find the issues for the defendant," held, that the property should be returned to the defendant.² Under a verdict which fails to find the value of the property to be returned, it is error to render a judgment for a return, but it is voidable and not void error.³

§ 1112. **Judgment for a return is a matter of right.** The defendant has the right to show that he is entitled to the goods, and to have judgment for a return.⁴ In replevin the general issue, with notice of other defenses, is equivalent to an avowry, with suggestion of a return, at common law, and a return should be awarded if defendant prevail.⁵ Where, in an action for the recovery of personal property, the property is delivered to the plaintiff, and he fails in the action, the defendant cannot have judgment for a return or for the value, at his election; but he must take a judgment in the alternative for the return of the property, or, if a return cannot be had, for the value as assessed.⁶ When a defendant in a replevin suit has a verdict in his favor, he can not forego his right to a return of the goods and recover their value in an action of assumpsit.⁷ In *detinue* there is no option of delivering up the property or paying the value; on the contrary, the judgment and execution are absolute for the return of the property if it can be found.⁸

¹ Whetmore v. Rupe, 65 Cal. 237.

² Underwood v. White, 45 Ill. 437.

³ State ex rel. v. Dunn, 60 Mo. 64.

⁴ McKesill v. Chaney, 6 Ind. 52; Everit v. Walworth, &c., 13 Wis. 419.

⁵ Hoffman v. Noble, 6 Metc. (Mass.) 68.

⁶ Seamon v. Luce, 23 Barb. (N. Y.) 240.

⁷ McKnight v. Dunlop, 4 Barb. (N. Y.) 36.

⁸ Robinson v. Richards, 45 Ala. 354.

§ 1113. **That the successful party is insolvent does not change his right to a return.** A defendant in replevin is entitled to a judgment for a return, if successful in the action, although he has gone into insolvency while it is pending, where the assignee in insolvency has not appeared to defend or asked to be made a party.¹ If a debtor, whose goods have been attached and who has replevied, take advantage of the insolvency law, and the defendant in replevin obtain a verdict, he will be entitled, notwithstanding the insolvency, to judgment for a return.

§ 1114. **Return can only be awarded against one in possession.** On judgment in defendant's favor, he is ordinarily entitled to an order for the return of the property, but upon the issue of *non detinet*, where plaintiff's action is defeated because he brought it against one not in possession, a return should not be awarded.² In an action for the recovery of specific personal property, judgment for possession may be given the plaintiff, though the property has not been taken and no bond given by defendant; and if the property cannot then be obtained, the plaintiff may recover the value, with damages, though the judgment should be in the alternative. In any case, the defendant must have had the property in his possession when the action was brought.³ But the general rule is that a return cannot be awarded unless plaintiff had delivery upon the writ.⁴

§ 1115. **The same.** Where *non cepit* and property in a stranger was pleaded by the agent of the owners of property on which salvage was due, and the court found both issues

¹ Hallett v. Fowler, 10 Allen (Mass.), 36. See Beford v. Penney, 65 Mich. 667 (32 N. W. 888).

² Brown v. Stanford, 22 Ark. 76; Neis v. Gillen, 27 Ark. 184.

³ Guloth v. Waldstein, 7 Mo. App. 66; Hamilton v. Clark, 25 Mo. App. 428. In Missouri, if no affidavit is filed and no bond given, the statute provides that the suit may proceed just the same, only the property is not delivered.

⁴ Scofield v. Ferrers, 46 Pa. St. 439; Brown v. Stanford, 22 Ark. 78; Connor v. Comstock, 17 Ind. 90; McKeal v. Freeman, 25 Ind. 151; McGinnis v. Hart, 6 Clark (Iowa), 210; Nickerson v. Chatterton, 7 Cal. 570.

for the defendant, it refused to order a return, the property having been sold for the salvage under legal process.¹ Judgment for the plaintiff in replevin is erroneous upon a special finding of facts which does not show that the defendant was in possession of the property sought to be recovered when the writ of replevin was issued, or any time thereafter.² Where the answer puts in issue the title of the plaintiff, as well as the taking and detention of the property by the defendant, and the record does not show that any bond has been given which could authorize the delivery of the property to the plaintiff, a general finding for the defendant will not support a judgment for the return of the property.³ Where the plaintiff is nonsuited on the ground that the property replevied had never been in the possession of the defendant, the latter is not entitled to a judgment for a return of the property or its value.⁴ A finding that the plaintiff had possession of the property at the commencement of the action will not sustain a judgment of replevin against a defendant wrongfully detaining it. If this finding is correct, the defendant could not be wrongfully detaining the property when the action was brought.⁵

§ 1116. **Exception in case of fraud.** Where it is shown that defendant is a party to a corrupt agreement to keep the property out of the reach of plaintiff, it is not error to enter judgment against defendant for a return, or the value, though at the time the property is not in his possession, if the defendant could cause a delivery of it if he chose to do so.⁶

§ 1117. **Where plaintiff fails in his action for any reason restitution should be awarded.** Where a plaintiff in replevin fails to prosecute his suit with effect, the law presumes title to the property in the defendant, and he has only

¹ Whitwell v. Wells, 24 Pick. (Mass.) 25.

² McCormick v. McCormick, 40 Miss. 760.

³ McKeal v. Freeman, 25 Ind. 151.

⁴ Gallagher v. Bishop, 15 Wis. 276; Timp v. Dockham, 32 Wis. 153.

⁵ Degering v. Flick, 14 Neb. 450 (16 N. W. 825).

⁶ Meixell v. Kirkpatrick, 33 Kan. 283 (6 P. 241).

to prove the amount of his damages in order to recover restitution.¹ When the plaintiff fails in his suit the presumption is that the property belongs to the defendant, and a return will be awarded unless some reason be shown why it should not be.² Whenever defendant justifies and shows right to possession, and plaintiff fails to show an exclusive right to the property, judgment of restitution should be awarded.³ The court having the property properly before it should dispose of it, as the facts developed on the trial show to be just. Where defendant pleads property in himself, if he prevail, an order for the return of the property follows of course.⁴

§ 1118. **Judgment of return should follow dismissal or nonsuit.** Where a plaintiff in replevin discontinues his suit, the necessary result must be a liability for the property taken, and damages for the detention; and the defendant, in that case, may elect to have a return and his damages.⁵ When plaintiff in replevin is nonsuited, defendant can have judgment for the thing replevied and costs, but not for damages.⁶ Where the action is dismissed for want of a sufficient bond, a return should be ordered.⁷ Where the action is dis-

¹ Rickner v. Dixon, 2 Green. (Iowa) 591; Thurber v. Richmond, 46 Vt. 398; McArthur v. Sane, 15 Me. 245; Wolbridge v. Shaw, 7 Cush. 561; Whitwell v. Wells, 24 Pick. 33.

² Barry v. O'Brien, 103 Mass. 521; Clark v. Adair, 3 Harr. (Del.) 116; Simpson v. McFarland, 18 Pick. 431; Mason v. Richards, 12 Iowa, 73; Jansen v. Effey, 10 Iowa, 227; Fleet v. Lockwood, 17 Conn. 233. Formerly return was never awarded in Ohio; the bond was supposed to give the plaintiff title. Smith v. McGregor, 10 Ohio St. 470; Williams v. West, 2 Ohio St. 87. But the statute has changed this.

³ Whitesides v. Collier, 7 Dana, 285; Cooper v. Brown, 7 Dana, 335.

⁴ Story's Pleadings, 2 Ed. 456-445, and note; Morris on Replevin, 87, 88; Wilkinson on Replevin, 91; Wells on Replevin. Same title.

⁵ Saunderson v. Lace, 1 Chand. (Wis.) 231.

⁶ Parnell v. Hampton, 10 Ired. (N. C. L.) 463; Kerley v. Hume, 3 T. B. Mon. (Ky.) 181; Chadwick v. Miller, 6 Iowa, 34; Smith v. Winston, 10 Mo. 299; Hacker v. Johnson, 66 Me. 21.

⁷ Lowe v. Brigham, 3 Allen (Mass.), 429; Fleet v. Lockwood, 17 Conn. 233; Greeley v. Currier, 39 Me. 516; Collamer v. Page, 35 Vt. 387.

missed on motion of defendant, he is not left to an action on the bond, but is entitled to a return.¹

§ 1119. **The same—A contrary rule.** Some courts hold that on a dismissal judgment for costs only can be given, and not for a return, leaving the party damaged to his remedy on the bond.² If the writ abate for the mistake of the clerk, the property will not be returned.³ So, where the defendant pleaded in abatement for a variance between the writ and the declaration, and did not claim a return, it was not awarded.⁴ But if the defendant is entitled to a return and claim it, it will be awarded.⁵ It may be stated as an almost general rule that a return will be awarded where plaintiff fails for any reason whatever, and this is the better practice.

§ 1120. **An action of replevin cannot be dismissed until the property is disposed of.** The judgment for a return is the final judgment in replevin, and is conclusive upon the parties as to the matters embraced within it. An action of replevin is not disposed of until the question of the return of the property is acted upon, notwithstanding the writ may have been abated on some technical ground. Until the property is disposed of by the court, both parties are in court with a legal right to be heard.⁶ See ch. XXXVIII.

§ 1121. **Judgment may be rendered for a return of part of the property and damages for the part not taken or returned.** The plaintiff may recover a part only of the chattels sued for; he is not bound to recover all or none.⁷ In replevin a recovery may be had to the extent of the title

¹ Funke v. Israel, 5 Iowa, 438.

² McIlvain v. Holland, 5 Harr. (Del.) 226.

³ Gould v. Barnard, 3 Mass. 199.

⁴ Hartgraves v. Duval, 1 Eng. (Ark.) 508; Dickinson v. Noland, 2 Eng. (Ark.) 26; Hill v. Bloomer, 1 Pinney (Wis.), 463; Simpson v. McFarland, 18 Pick. 430; Gould v. Barnard, 3 Mass. 199.

⁵ People, ex rel., v. N. Y. Com. Pleas., 2 Wend. 644; Hoeffner v. Stratton, 57 Me. 360.

⁶ Moore v. Herron, 17 Neb. 697 (24 N. W. 425); Tuck v. Moses, 58 Me. 461.

⁷ Glass v. Pinckard, 56 Ala. 592.

proved by plaintiff.¹ If an action of replevin be brought for taking several articles, and on an issue as to the plaintiff's property in them, he prove himself entitled to a part, the defendant has a right to a return of the others, and to damages for the taking of them² In an action for the recovery of personal property, if the plaintiff establishes title to only a portion of the property, he is entitled to his costs. In respect to the portion to which he does not establish his right of possession, judgment of return should be rendered, or for the value if a return cannot be made.³ Where property levied on by execution is replevied by a third party and the officer pleads *non detinet* and property in a third party, on a verdict in favor of plaintiff, except as to a certain mare, judgment should be rendered for a return to defendant, as to the mare, and refusal to do so is error.⁴

§ 1122. Judgment of return should fix a reasonable time in which the return is to be made, and if not complied with, the money judgment to become operative then. Where the time is not fixed, a reasonable time under all the circumstances should be allowed. Thus where a judgment for the return of a mare and colt was awarded, and in lieu of the return judgment for \$160, and when the plaintiff tendered the property, it was refused, it was held that an offer to return within thirty days was sufficient and within a reasonable time.⁵ (See ch. XXXVII.) The order for delivery is a part of the judgment, and it must be made at the time the judgment is entered, and cannot be made at a subsequent term.⁶

¹ Walker v. Hunter, 5 Cranch. (C. Ct.) 462.

² Wright v. Matthews, 2 Blackf. (Ind.) 187.

³ Horton v. Horne, 99 N. C. 219 (5 S. E. 927).

⁴ Pratt v. Tucker, 67 Ill. 346. See Mattingly v. Crowley, 42 Ill. 300.

⁵ McClellen v. Marshal, 19 Iowa, 562.

⁶ Weizen v. McKinney, 2 Wis. 288; Wilkins v. Treynor, 14 Iowa, 393; Clark v. Warner, 32 Iowa, 219; Funk v. Israel, 5 Iowa, 454; Kates v. Thomas, 14 Minn. 461; Fitzhugh v. Wiman, 9 N. Y. 559; Dwight v. Enos, 5 Seld. (N. Y.) 470; Lill v. Stooky, 72 Ill. 495; Nickerson v. Chaterton, 7 Cal. 572.

§ 1123. Where the successful party already has possession judgment for a return is not necessary. Where there is judgment for defendant in a replevin suit, he is not entitled to judgment for the property or its value where it appears that it was never delivered to plaintiff.¹ Return need not be awarded in replevin where the property has been delivered under the writ to the plaintiff on a finding for him.² Where plaintiff obtains possession of the property and retains the same on a finding in his favor, judgment for a return of the property alone, and not in the alternative for a return or the value, is good, and defendant can take no advantage of it.³ Where the verdict is in favor of plaintiff for some of the articles claimed, and in favor of the defendant for some, and it does not appear that defendant's possession of any has been disturbed, the defendant is entitled to no judgment, and is not prejudiced by failure to assess the value of the articles found to be his, or damages for taking and withholding them. Judgment must not be for a greater amount than that claimed in petition.⁴ A plaintiff in replevin having failed in his suit for the reason that the property was shown by the evidence to have been in his own possession when he sued out his writ, a judgment for a return of the property to the defendant is erroneous.⁵ In replevin where a nonsuit is suffered by plaintiff and it appears that the property never has been moved, that the plaintiff could not take full possession without a custom-house delivery-order, which had remained in defendant's possession all the time, *held*, that an order of return was not necessary, and that defendant was not entitled to damages.⁶ But that there may be no question about the *status* of the property, the judg-

¹ Clapp v. Trowbridge, 74 Iowa, 550 (38 N. W. 411).

² Smith v. Dodge, 37 Mich. 354.

³ Mills v. Kansas Lumber Co., 26 Kan. 574.

⁴ Ward v. Masterson, 10 Kan. 77.

⁵ Gidday v. Witherspoon, 35 Mich. 368.

⁶ Ware River R. R. Co. v. Vibbard, 114 Mass. 458.

ment should decree the right to possession in the successful party in distinct terms.

§ 1124. **Nor if he has acquired possession during litigation.** In replevin, where it appears by the officer's return that he has restored the property replevied, it is error to render a judgment *retorno habendo*, nor will a *remittitur* of the damages cure the error.¹ Although the question in replevin is the status of the property at the commencement of the action, still the court should inquire into the title and possession of the property down to the day of trial, that complete justice may be done.² If it appear that a change in possession or ownership has taken place during the pendency of the suit, as by the expiration of a lease, or the termination of a limited interest, or for any reason, the court will consider this, and not award a return when it would be inequitable to do so.³ But judgment for costs and damages should be given, based on the right of possession at the commencement of the suit.⁴

§ 1125. **Nor where the suit proceeds as one for damages only,** and a general verdict and money judgment in such cases has been held sufficient.⁵ Where the writ was not executed and the property not delivered to plaintiff, on his defeat in the suit, no return should be awarded, as there is nothing to return.⁶ In action of replevin, a recovery may be had as in an action of conversion of personal property if

¹ Harrod v. Hill, 1 Dana (Ky.), 165.

² Johnson v. Neale, 6 Allen (Mass.), 229.

³ Ingraham v. Martin, 15 Me. 373; Whitwell v. Wells, 24 Pick. 33; Walpole v. Smith, 4 Blackf. 306; Davis v. Harding, 3 Allen, 303; Dawson v. Wetherbee, 2 Allen, 461; Simpson v. McFarland, 18 Pick. 430; Collins v. Evans, 15 Pick. 65; Allen v. Darby, 1 Show. 99; O'Conner v. Blake, 29 Cal. 313; Wheeler v. Train, 4 Pick. 168; McNeal v. Leonard, 3 Allen (Mass.), 268.

⁴ Ator v. Rix, 21 Ill. App. 309.

⁵ Meredith v. Kennard, 1 Neb. 315.

⁶ Prentiss v. Moore, 3 Bradw. (Ill.) 539; Hill v. Wilkinson, 25 Neb. 103 (41 N. W. 134).

the facts stated are sufficient, notwithstanding the prayer is for a return or the value.¹

§ 1126. **Right of property must be shown to entitle a party to a return.** To authorize a judgment of return in favor of defendant in an action of replevin, he must become actor, and assert a right of property in himself.² In replevin where *non-detinet* was pleaded by the defendant, and he showed no title or right of possession, *held*, that on a verdict for the defendant, he was not entitled to a return.³ If a verdict of *non-cepit* is rendered on a plea of *non-cepit*, with a claim of property, the defendant is entitled to judgment for a return.⁴ But on *non-cepit* alone or with claim of property in a third party, defendant is not entitled to a return.⁵ Where a plea of property is interposed as well as a plea of *non-cepit*, a verdict for the plaintiff, upon the latter plea, determines nothing between the parties except the taking; and the plaintiff is not entitled to recover unless property be found in him also.⁶ Where the defendant did not obtain the possession of the property with proper authority or right from the plaintiff in replevin, the court will not, pending the action, award a return of the property.⁷ If an action of replevin is defeated solely by reason of its being prematurely commenced, judgment for a return of the goods replevied will not be ordered.⁸

§ 1127. **One who disclaims all interest in the property cannot have a return.** Where a defendant in replevin sets up no right or claim to the property, but denies having been in possession when the writ was issued and served, and this

¹ Howard v. Barton, 28 Minn. 116 (9 N. W. 584); Morish v. Moun-tain, 22 Minn. 564; Washburn v. Mendenhall, 21 Minn. 332.

² Bonner v. Coleman, 3 B. Mon. (Ky.) 464.

³ Johnson v. Howe, 7 Ill. (2 Gilm.) 342.

⁴ Moulton v. Bird, 31 Me. 296.

⁵ Whitwell v. Wells, 24 Pick. (Mass.) 25; Simpson v. McFarland, 18 Pick. (Mass.) 427; People v. Niagara, 4 Wend. (N. Y.) 217.

⁶ Bemus v. Beekman, 3 Wend. (N. Y.) 667; 7 Cow. 30.

⁷ Montgomery v. Black, 4 Har. & M. (Md.) 391.

⁸ Martin v. Bagley, 1 Allen (Mass.), 381.

is found in his favor, he has no claim to a judgment for the return or its value, but only to a judgment for his costs.¹ A judgment for the return of certain personal property, and damages for its detention, cannot be sustained against one who is shown by the testimony neither to have possession nor to claim any right to the possession.² But because a defendant disclaims all interest is no ground of dismissing the suit; he might be guilty of a wrongful taking or detention; the court should examine into the matter and see. If his plea be true he can be taxed with no costs from the time of filing it.³

§ 1128. **One who pleads property in a stranger** will not be awarded a return unless he show some reason to entitle him to the possession, as that he is the agent or responsible to the stranger.⁴ Where the defendant pleads property in a stranger, which plea is upheld, but does not connect himself with the title of the stranger; he is not entitled to a return except, where the plaintiff was a trespasser, or a wrongdoer without color of right, when a return will sometimes be awarded on the theory that he who had peaceable possession had a better right than a wrongdoer.⁵

§ 1129. **Where it is impossible that the property should be returned**, judgment for value alone is not error; the law does not require impossible things.⁶ If, on the trial of an

¹ *Hinchman v. Doak*, 48 Mich. 168 (12 N. W. 39):

² *Ladd v. Brewer*, 17 Kas. 204.

³ *Smith v. Emmerson*, 16 Ind. 355.

⁴ *Dozier v. Joyce*, 8 Port. (Ala.) 303; *Brown v. Webster*, 4 N. H. 500; *Rogers v. Arnold*, 12 Wend. 30; *Duncan v. Spear*, 11 Wend. 54; *Wilkerson v. McDougal*, 48 Ala. 518. See *Van Namee v. Bradley*, 69 Ill. 300; *Mitchell v. Alestree*, Vent. 249.

⁵ *Landers v. George*, 40 Ind. 160; *Walpole v. Smith*, 4 Blackf. 305; *King v. Ramsay*, 13 Ill. 619; *Underwood v. White*, 45 Ill. 438; *Constantine v. Foster*, 57 Ill. 38; *Prosser v. Woodward*, 21 Wend. 209; *Morse v. Stone*, 5 Barb. 516; *Quincy v. Hall*, 1 Pick. 357; *Waldman v. Broder*, 10 Col. 379; *Easton v. Worthington*, 5 S. S. & R. (Pa.) 132; *Ingraham v. Hammond*, 1 Hill (N. Y.), 353, and cases cited; *Butcher v. Porter*, 1 Salk. 94; *Allen v. Darby*, 1 Show. 97; *Salkold v. Skelton* Civ. Jac. 519.

⁶ *Boley v. Griswold*, 20 Wall. 486.

action in replevin, it appear that the property has been hopelessly lost or has been destroyed, so that a judgment for its delivery would be unavailing, judgment for damages alone, without judgment for its possession, is at most but a technical error for which the judgment will not be reversed.¹ Where a portion of the articles claimed have been disposed of by the defendant so that he cannot return them, it is not necessary that the court should find the character or value of the articles which can be returned, or that the judgment should be in the alternative; in such a case a judgment for the value of the entire property is proper.²

§ 1130. **It is error to order the return of property not in existence.** In replevin for four cattle one died before trial, and judgment was entered for return of the four; reversed on that ground as it should have been for the return of the three.³ Where it appears that the property is hopelessly lost or destroyed, it is not necessary to render judgment for a return;⁴ the law does not countenance the entry of vain orders.

§ 1131. **Effect of death or destruction of property.** As we have just seen, where the property is not in existence at the time of the trial, a return will not be ordered. But a judgment for value is quite another thing; the correct rule is that the death or destruction of the property in the hands of a wrongdoer, is no bar to a judgment against him for the value.⁵ See this title § 867-9. The common law purpose of replevin differed from the present use of it so much as to furnish us no guide on this point. Property taken for a distress was at the risk of the owner; if it died it had no effect on the landlord's right to rent.⁶

¹ Brown v. Johnson, 45 Cal. 76.

² Burke v. Koch, 75 Cal. 356 (17 P. 228). In this case there was actual fraud participated in by Koch.

³ Mattingly v. Crowley, 42 Ill. 300.

⁴ Brown v. Johnson, 45 Cal. 77; Boley v. Griswold, 20 Wall. 486.

⁵ Carpenter v. Stevens, 12 Wend. 589.

⁶ 3 Bla. Com. 145. See Parsons on Contracts, III., 217.

§ 1132. **The young of animals born while in litigation** may be ordered returned, as they stand in the same position as the dams in relation to the suit, unless a contrary agreement is shown,¹ and the same rule was followed in case of the children of a slave mother.² Wool shorn from sheep and milk of cows while in litigation should not be ordered returned, but considered in assessing the damages.³

§ 1133. **Effect of failure to adjudge a return.** Where the property has been delivered under the writ to the plaintiff, and on the trial no return is awarded, the title at once vests absolutely in the plaintiff.⁴ The gist of the action is the possession of the property, and if the court fail to make an order in regard to it, the presumption is that it was satisfied, that it should remain where it was. But the judgment should always speak upon this point and leave nothing to inference.

§ 1134. **Judgment for value is only proper where a return is awarded.** Where there is no judgment for the return of the property replevied, there can be no judgment for its value.⁵ A judgment for the plaintiff in replevin, when the property is in his possession, may award him the damages assessed for the wrongful detention, but will be erroneous if it award to him, as an alternative of possession, the assessed value of the property.⁶ Where the property has been delivered to the plaintiff under the writ, it is error to render judgment for the value of the property on finding in his favor.⁷ Where the defendant does not claim a judgment for return, he is still entitled to judgment for costs on

¹ Buckley v. Buckley, 12 Nev. 423; Jordan v. Thomas, 31 Miss. 558.

² Seay v. Bacon, 4 Sneed. (Tenn.) 103.

³ Buckley v. Buckley, 12 Nev. 423.

⁴ Kayser v. Bauer, 5 Kas. 202.

⁵ Foster v. Bringham, 99 Ind. 505; Gould v. Scannell, 13 Cal. 430; Bourk v. Riggs, 38 Ill. 320; Vose v. Hart, 12 Ill. 378.

⁶ Baird v. Taylor, 30 Mo. App. 580.

⁷ Blackwell v. Acton, 38 Ind. 425. See Bemus v. Beekman, 3 Wend. 667; Mills v. Gleason, 21 Cal. 280; Johnson v. Howe, 2 Gilm. 342.

finding in his favor.¹ In replevin judgment for the value of the property can only be rendered against defendant where it shall appear by the officer's return to the writ that he did not obtain the property under the writ. The plaintiff's affidavit of that fact is not sufficient; if the writ is lost it should be restored by copy.² Judgment may be given for a return of the property, instead of for its value, if, when the verdict is rendered, no one is present for the party entitled to it and no evidence of value has been produced.³ The value of property is not in issue in replevin, except for the purpose of an assessment of value in defendant's favor; or, in other words, the value is only material where a return is awarded. It is not so much the value of the property as the amount of the damages involved which should determine the jurisdiction of the court.⁴

§ 1135. **Where the property can be returned, the party in possession cannot complain of error in fixing the value.** Where, in an action of replevin, the property is turned over to the plaintiff, and at the trial judgment is rendered for the defendant, and the value found to be greatly less than the amount stated by the plaintiff in the affidavit of replevin, *held*, that such finding of value cannot be complained of by the plaintiff where he fails to return the property as directed by the judgment.⁵

§ 1136. **Where defendant has but a limited interest, which is less than the value of the property, judgment in his favor should not be for the full amount unless he is liable to the general owner, but should be only for the amount of his special interest.**⁶ Plaintiff having obtained possession at the commencement of the action, the judgment upon a proper

¹ *Cowling v. Greenleaf*, 32 Kan. 392 (4 P. 855).

² *Kehoe v. Rounds*, 69 Ill. 351.

³ *Kelso v. Saxton*, 40 Mich. 666.

⁴ *Eldred v. Woolaver*, 46 Mich. 241 (9 N. W. 266).

⁵ *Weil v. Ryms*, 39 Kan. 564 (18 P. 524).

⁶ *Fowler v. Hoffman*, 31 Mich. 221; *Russell v. Butterfield*, 21 Wend. 300.

verdict, in case a return could not be had, should be that the defendant recover, not the full value of the chattel, but merely the value of his special property therein.¹ In replevin against an officer holding under orders of attachment, the value of his interest is the value of the attachments levied by him prior to being dispossessed by replevin.²

§ 1137. **An officer is entitled to judgment of return when successful.** Where mortgaged chattels were levied upon under execution against the mortgagor, and the mortgagee replevied them, but the judgment was for the defendant—the officer who made the levy—the judgment should have been for the return of the property, or in default thereof, for the amount due on the execution, and not for the entire value of the property, where that was more than the amount due on the execution. But, although the alternative judgment was for a greater amount, plaintiffs cannot complain so long as they may discharge the same by the return of the property.³ To authorize a judgment *de retorno habendo* in favor of the sheriff, it is sufficient that he allege the taking by writ of *fi. fa.* against the plaintiff, and that the property belonged to the defendant, subject to the writ, and that the jury so found.⁴ Under a plea of property in a stranger, the defendant, who held as deputy sheriff by virtue of the writ against the stranger, is entitled to a return.⁵

§ 1138. **Officer only entitled to a return where he can sell.** His right under the law to reduce the property to money is the basis of his right to the property.⁶

§ 1139. **The same—Exception.** Where the plaintiff shows no right to the property, the law will not leave it in his hands, even though the officer has shown no right but peaceable possession. After a verdict for the defendant in

¹ Warner v. Hunt, 30 Wis. 200.

² Merrill v. Wedgwood, 25 Neb. 283 (41 N. W. 149).

³ Ormsby v. Nolan, 69 Iowa, 131 (28 N. W. 569).

⁴ Stephens v. Frazier, 2 B. Mon. (Ky.) 250.

⁵ Quincy v. Hall, 1 Pick. (Mass.) 357.

⁶ Soffel v. Wash, 4 B. Mon. (Ky.) 92.

an action of replevin against an attaching officer, in which the question of property in the plaintiff was tried, and a verdict found against him, judgment for a return of the goods replevied will be ordered, although since the rendition of the verdict the attachment has been dissolved.¹

§ 1140. **An officer may have judgment for a sum larger than the value of the goods.** In an action for the recovery of goods seized by a sheriff, where the damages alleged are larger than the judgment, it is not error that the judgment is for a larger sum than that at which the goods are valued, as the plaintiff is not estopped, by this valuation, from recovering any sum within the *ad damnum*.²

§ 1141. **Where the amount of the special interest is not found, a return should be awarded.** Where goods held by a sheriff under an attachment are taken from him by writ of replevin, a judgment in his favor, before the attachment suit is decided, must be for the return of the property, and not for the special value of his lien.³ Where a jury finds that defendant has a special lien, but does not find what the property is worth, there is nothing on which to base a personal judgment against the plaintiff for the amount of the lien.⁴ But where the value of his special interest can be determined, he is entitled to the possession of the property on a finding in his favor, or in lieu thereof the value of his special interest, and not the value of the goods in controversy;⁵ in other words, when the amount of his special interest, which is in the nature of a lien, is tendered him, his right of possession is thereby terminated, and the right of possession is transferred to the owner.

¹ Dawson v. Wetherbee, 2 Allen (Mass.), 461. See Kimball v. Thompson, 4 Cush. 441; Johnson v. Neale, 6 Allen, 228.

² Coghill v. Boring, 15 Cal. 215.

³ Frederick v. Mecosta, Circuit Judge, 52 Mich. 529 (18 N. W. 343). This seems to ignore the amount called for by the attachment writs as the basis of the sheriff's special property.

⁴ Alderman v. Manchester, 49 Mich. 48 (12 N. W. 905).

⁵ Shahan v. Smith, 38 Kan. 474 (16 P. 749).

§ 1142. A joint judgment can only be rendered for or against parties shown to have a community of interest in the property in question, or to have both been concerned in the taking or detention.¹ There cannot be two separate findings and judgments upon one affidavit against two defendants not jointly, but severally, in possession of part of the property claimed. The finding and judgment must follow the pleadings, and such an error is not cured, after verdict, by the statute of *jeofails*.² A judgment in replevin cannot be entered for value in favor of several defendants jointly, where some of them are not found to have been interested.³ Where there are several defendants, and no community of interest or ownership in the property is shown by them, a joint judgment in their favor is erroneous.⁴

§ 1143. Joint judgment for defendants who make separate defenses. One defendant claimed title to a one-half interest in the property; the other defendant claimed a lien on the other half interest for a loan. *Held*, that as they were sued jointly there was no error in rendering a joint judgment in their favor for a return of the horse or its value.⁵ A joint judgment in replevin is proper where the possession of the defendants was joint, and they were connected in all the transactions upon which it was based.⁶ In a joint suit in replevin there may be a verdict and judgment for one plaintiff and against the others.⁷ Where husband and wife join in bringing an action of replevin, and are beaten, judgment should be against both of them for a return and for costs, and execution should run against both of them.⁸

¹ Sweetzer v. Mead, 5 Mich. 107; Palmer v. Meiners, 17 Kan. 478.

² Williams v. Devine, 52 Miss. 139.

³ Steele v. Matteson, 50 Mich. 313 (15 N. W. 458).

⁴ Page v. Fowler, 39 Cal. 412.

⁵ Myers v. Moulton, 71 Cal. 498 (12 P. 505).

⁶ West Michigan Savings Bank v. Howard, 52 Mich. 423 (18 N. W. 199).

⁷ Hamilton v. Browning, 94 Ind. 242. The Indiana statute provides for such a judgment, however, § 568 R. S. 1881.

⁸ Waterman v. Fairbrother, 12 R. I. 195; Hall v. White, 27 Conn. 488; Freeman on Executions, §§ 22, 128, 459.

Where there are several defendants the court may adjudge a return to one of them, and refuse it to others, or it may be in favor of all, or part to one and part to another, or part to the defendant and part to the plaintiff as the facts warrant.¹

§ 1144. **Judgment against a person not a party void.** Where the plaintiffs in the attachment proceedings are not made parties defendant, a judgment rendered jointly against the sheriff and the attaching creditor is erroneous as to the persons not parties to the suit.² Where there are two joint defendants, and the writ is served on one only, and only that one is in court, judgment against both is wholly void.³

§ 1145. **Proper judgment in certain cases—Practice.** A judgment for a return not technically conformed to the statute but substantially correct will be upheld.⁴ If the case made by the evidence authorizes a return, it may be awarded by the court after verdict, though not claimed in the pleadings.⁵ If the right of property is put to issue by a defendant, and the finding is in his favor, a return is a matter of course, whether prayed for or not.⁶ Upon a general verdict for the defendants in replevin, an order of the court for the restoration to them of the property replevied is correct, although the plaintiff may have produced evidence that it was owned by a third person not a party to the suit jointly with himself.⁷ Where a verdict is for defendant, the judgment should be for a return of the property, or the value thereof in case a return cannot be had, or the value of the possession of the same, and for damages for withholding the property, and for costs of suit.⁸ Where judgment is rendered

¹ Woodburn v. Chamberlain, 17 Barb. 446; Wells v. Johnson, 16 Barb. 375.

² Palmer v. Meiners, 17 Kan. 478.

³ Ouly v. Dickinson, 5 Cold. (Tenn.) 486.

⁴ McArthur v. Hogan, Hempst. 286; Gotloff v. Henry, 14 Ill. 384.

⁵ Mattock v. Straughn, 21 Ind. 128; Conner v. Comstock, 17 Ind. 90.

⁶ Tuley v. Manzey, 4 B. Mon. (Ky.) 5; King v. Ramsay, 13 Ill. 619; Bates v. Buchanan, 2 Bush. (Ky.) 117; Chandler v. Lincoln, 52 Ill. 76; Underwood v. White, 45 Ill. 438.

⁷ Waldman v. Broder, 10 Cal. 378.

⁸ Hooker v. Hammill, 7 Neb. 231.

in favor of the defendant, he is entitled to damages for the decrease of property in value and interest, and if it cannot be returned, for its value at the time it was taken, with interest.¹ Where the defense was that defendant had levied and held the property on execution, and the justice rendered judgment "against plaintiff, and in favor of defendant for costs, "and that defendant is entitled to the possession of the property," held, that the judgment, though defective, was not void.² The nature and sufficiency of the judgment determined in cases depending upon particular facts.³

§ 1146. Judgment on plea of non cepit and non detinet, though not ordinarily settling the right of possession, in many states by statute, they are equivalent to the general issue. In such a case, where the plea is sustained a return should be awarded.⁴ Under the common law, and where these pleas still have their common law force and effect, the defendant on such plea alone is not entitled to a return.⁵

§ 1147. An absolute money-judgment is erroneous. The action of replevin has for its primary object the recovery of specific personal property, and an ordinary judgment for a sum of money is not responsive to the issues raised, and will be vacated and set aside on motion.⁶ The judgment should be in the alternative for a return or for the value, even if it appear that the property has been sold; an absolute

¹ Moore v. Kepner, 7 Neb. 291.

² Ponceon v. Hill, 38 Wis. 156.

³ Dickinson v. Lovell, 35 N. H. 9; Hunt v. Moultrie, 1 Bosw. (N. Y.) 531; Mairs v. Taylor, 40 Pa. St. 446; Collamer v. Page, 35 Vt. 387; Bower v. Tallman, 5 Watts & S. (Pa.) 556; Wheeler v. Train, 4 Pick. (Mass.) 167; Hurd v. Gallaher, 14 Iowa, 394; Gaines v. Tibbs, 6 Dana (Ky.), 143; Lewis v. Buck, 7 Minn. 104; Only v. Dickinson, 5 Coldw. (Tenn.) 483; Hcman v. Noble, 6 Metc. (Mass.) 68.

⁴ Ford v. Ford, 3 Wis. 399; Noble v. Epperly, 6 Ind. 414; Sparks v. Heritage, 45 Ind. 66; Branch v. Wiseman, 51 Ind. 1; Underwood v. White, 45 Ill. 438.

⁵ Smith v. Snyder, 15 Wend. 324; Pierce v. Van Dyke, 6 Hill 613; Bemus v. Beekman, 3 Wend. 667; Hanford v. Obrecht, 38 Ill. 493.

⁶ Hamilton v. Clark, 25 Mo. App. 428; Smith v. Smith (Ore.), 21 P. 439

judgment for the value is erroneous.¹ Where property not taken, money-judgment proper.² The clerk has no authority to enter an absolute judgment for the interest allowed by the jury as damages. If the property is returned no interest is recoverable.³ But a judgment for damages alone has been held not to be void.⁴

§ 1148. **Equities should be adjusted—Damages.** The judgment in replevin should so far as possible adjust all the equities which arise between the parties to the suit in its progress, and in a suit by the general owner against one who claims a special interest. If defendant's interest in the property expire, or is extinguished after the suit is brought and before judgment, such fact should be shown and considered in rendering judgment, which in such a case would be for costs only.⁵ In claim and delivery brought to get possession of property in order to sell it to satisfy a lien, if all the parties are before the court, the court should settle the rights of all parties. As the plaintiff is but a trustee, the value of his interest should be ascertained.⁶

§ 1149. **Proper judgment for damages.** For the proper measure of damages, see the chapters on this subject. In the absence of proof of actual damages, nothing more than nominal damages can be allowed. The presumption of law is that the successful party is entitled to some damage, but if none is proved his recovery is confined to mere nominal damages, as one cent. This is looked upon as a peg on which to hang costs, as nominal damages always carry costs.⁷ If

¹ *McNamara v. Eisenleff*, 14 Abb. Pr. (N. Y.) 25; *Cochran v. Gottwald*, 41 N. Y. Sup. Ct. 317.

² *Hill v. Wilkinson*, 25 Neb. 103 (41 N. W. 134).

³ *Munsell v. Flood*, 46 N. Y. Sup. Ct. 134.

⁴ *Dorrington v. Meyer*, 8 Neb. 211.

⁵ *Hickman v. Dill*, 32 Mo. App. 509; *Dilworth v. McKelvy*, 30 Mo. 149; *Leonard v. Whitney*, 109 Mass. 266; *Boutelle v. Warne*, 62 Mo. 350; *Barney v. Brannon*, 51 Conn. 175; *Ator v. Rix*, 21 Ill. App. 309.

⁶ *Austin v. Secrest*, 91 N. C. 214. See *Dougherty v. Cooper*, 77 Mo. 528.

⁷ *Bartlett v. Brickett*, 14 Allen (Mass.), 62.

the plaintiff recover, he recovers the whole in damages; if the defendant recover, he has judgment for a return.¹ One dollar is held to be more than nominal damages; five cents seems to be the limit.² A judgment giving six cents damages is irregular, in the absence of a finding, as to amount of damages.³

§ 1150. **A stipulation as to the amount of damages will be enforced by the court.** A stipulation in a replevin suit, that if the court should find the defendant lawfully entitled to the possession, judgment should be rendered for him for a specified sum, is an admission of record that is conclusive and supersedes all inquiry into the value of defendant's interest, and precludes the plaintiff from claiming that defendant's right was one possessing only a nominal value.⁴ If the plaintiff in replevin fail to prosecute his suit with effect, the assessment of damages is imperative, and may be made by the court if neither party object.⁵ Where the jury found generally for the defendant, and were sent back by the court to find the value of the property and damages for its detention, which they did, *held*, no error.⁶

§ 1151. **Liability and obligations of an administrator.** Where plaintiff brings suit in replevin as administrator, and judgment is rendered against him, it should be entered against him in his official character, to be levied out of the testator or intestate's estate.⁷ And if administrator allow surety on his replevin bond to pay the judgment against the estate in a replevin suit, the surety in replevin is entitled to recover the amount out of the estate or out of the administrator's official bond.⁸

¹ Moore v. Shenk, 3 Pa. St. 13.

² White & Sons v. Woodruff, 25 Neb. 806 (41 N. W. 781-5).

³ Riess v. Delles, 45 Wis. 663.

⁴ Macomber v. Soiton, 28 Mich. 516.

⁵ Reed v. Wilson, 13 Mo. 28.

⁶ Noble v. Epperly, 6 Ind. 468.

⁷ Raney adm. v. Thomas, 45 Mo. 111.

⁸ State, for use, &c., v. Farrar, 77 Mo. 175. As to rights of adminis-

§ 1152. **Substitution of defendants.** In many states the statute provides that in replevin against an officer, the parties he represents, *i. e.*, the judgment or attachment plaintiffs may be substituted for him; where this is done it does not affect the procedure in any way except the change of parties. The substituted defendants are liable for costs the same as the officer would have been.¹

§ 1153. **Substitution of an intervenor.** In an action for property levied upon by a constable, a third person claiming the property intervened, and it was agreed that the constable should be discharged from the case, that no damages or costs should be rendered against him, and that the property should be regarded as in the hands of the court, subject to a final determination between plaintiff and intervenor, *held*, that it did not have the effect to release plaintiff from liability to the intervenor on account of the use and detention by him of the property, which was in his hands for a long time.²

§ 1154. **Surety on bond in replevin may be allowed to prosecute the suit when abandoned by his principal.** The plaintiff who resided in a foreign country brought replevin, gave bond, and received the property, but before trial became insolvent and did not appear, and judgment went against him; *Held*, that on motion of a surety on the bond, the judgment should have been set aside, and the surety allowed to prosecute the action to final determination in name of his principal.³ In the absence of a statutory provision the general rule is that the sureties do not become parties to the

trator, see *Andrews v. McLeod* (Miss.), 6 So. 181; *Afferbach v. McGovern* (Cal.) 21 P. 837.

¹ *Romick v. Perry*, 61 Iowa, 238 (16 N. W. 93). The statute under which this substitution was made was held unconstitutional in *Sunberg v. Babcock*, 61 Iowa, 601-716. (16 N. W. 716.)

² *Van Horn v. Overman*, 75 Iowa, 421 (39 N. W. 679). In this case there seems to have been some doubt in the minds of the court as to whether or not the intervenor consented to this arrangement.

³ *Hoffman v. Steinan*, 34 Hun. 239.

suit, and acquire no right to control it in any way by signing the bond.

§ 1155. **Judgment against the sureties** may in some states be rendered in the replevin action, and no separate action on the bond is necessary.¹ Where this mode of procedure is recognized the sureties are said to have had their day in court in the replevin action, still they can usually contest the amount of the recovery after this judgment. But the usual and better rule is that a separate action must be brought against the sureties on the bond.² The proceeding by motion for an award of execution, on a replevin bond, is a summary remedy, and must therefore conform to the statute in all material respects.³ Execution cannot legally issue upon a replevin bond which has not been acknowledged before an officer.⁴ In Alabama an execution may issue on a replevin bond in an attachment when returned forfeited by the sheriff and without an assignment to plaintiff.⁵ The condition of a replevin bond can only be complied with, after a judgment has been rendered against the defendant in attachment, by a delivery of the property to the sheriff on his demand. If the bond be returned "forfeited" for non-delivery, the plaintiff in attachment has a right to a *fi. fa.* against all the obligors, without any further action of the courts.⁶ Bonds given in an ordinary action in the nature of replevin cannot be enforced against the security by motion.⁷

§ 1156. **Costs.** Where a defendant justifies the taking and claims the property, and is successful as to part of it, he

¹ McKinney v. Green, 52 Miss. 70.

² Garland v. Bartels, 2 N. M. 1.

³ Tift v. Verden, 15 Miss. (7 S. & M.) 91.

⁴ Williams v. Hall, 2 Dana. (Ky.) 97.

⁵ Shute v. McMahon, 10 Ala. 76; but *sci fa* is the proper mode of procedure. Summers v. Parker, 2 Tayl. (N. C.) 147; Thompson v. Raymon, 8 Miss. 186; Sartin v. Weir, 3 Stew. & P. (Ala.) 421.

⁶ Cooper v. Peck, 22 Ala. 406.

⁷ Gay v. Morgan, 4 Bush. (Ky.) 606; Jansen v. Effe, 10 Iowa, 227.

is entitled to costs.¹ Where the property was delivered to plaintiff, and on trial part of it was awarded to him and part ordered returned, or judgment against plaintiff for its value, judgment that each party pay his own costs may be given and will not be disturbed.² If, in replevin, the property has been delivered to the plaintiff and retained or disposed of by him, and on the trial it is found that each party is the owner of a portion of the property, costs should be awarded to each. If the judgment be silent as to costs it will not be disturbed, as this is virtually an offset of the costs of one party against the costs of the other.³ Where the execution-plaintiff is made a defendant in an action of replevin against the officer, but claims no affirmative relief in his answer, a judgment against him for costs is erroneous.⁴ A plaintiff obtaining a verdict is entitled to costs.⁵ A plaintiff in replevin who has retained possession of the property under the statute, is still entitled to judgment for his costs on a finding in his favor, even if no damages are awarded him and the value of the property is not fixed.⁶ Where the court has no jurisdiction, it cannot render a judgment against the defendant for costs.⁷

¹ *Small v. Bixley*, 18 Wend. 514; *Seymour v. Billings*, 12 Wend. 285; *Johnson v. Fellows*, 6 Hill 353. These decisions were before the enactment of the code, but the same rule has been followed under the code. *Porter v. Willet*, 14 Abb. Pr. 319; *Summers v. Jarvis* 14 Abb. Pr. 322; *Hull v. Halsted*, 1 How. Pr. 174; 3 Wait's Pr. 464. See Voorheis' code, 1871, 487-491.

² *Dresher v. Carson*, 23 Kan. 313.

³ *Lanyon v. Woodward*, 65 Wis. 543 (27 N. W. 337); *Vinal v. Spofford*, 139 Mass. 126.

⁴ *Furrow v. Chapin*, 13 Kan. 107.

⁵ *Ashbell v. Tipton*, 1 B. M. (Ky.) 303.

⁶ *Claffin v. Davidson*, 8 N. Y. Civ. Proc. R. 46.

⁷ *Collamer v. Page*, 35 Vt. 387.

CHAPTER XXXVI.

EFFECT OF JUDGMENT—HOW ENFORCED AND SATISFIED.

	Section.		Section.
Effect of the judgment	1157	parties, but on their priv- ies	1169
The same—Illustrations	1158	Judgment in replevin a bar to suit for damages, be- tween the same parties only	1170
Judgment in replevin settles the right to possession	1159	Judgment conclusive in fed- eral and sister state courts	1171
<i>Non cepit</i>	1160	An officer is liable on his offi- cial bond for the judgment against him in replevin	1172
<i>Non detinet</i>	1161	A trustee not personally liable	1173
Judgment in replevin, how far conclusive	1162	The payment of the money judgment vests the title to the property in the de- feated party	1174
Bar—Estoppel—Former re- plevin	1163	Of two defendants, the one who pays takes the title	1175
Judgment when a bar— What it is a merger of	1164	How enforced	1176
When conclusive in another replevin action	1165	How satisfied	1177
How far binding in other forms of action	1166	In conclusion—Summary	1178
Does not bar a suit inequity to determine the rights of the parties	1167		
Title not determined unless strictly in issue	1168		
Judgment in replevin is binding not only on the			

§ 1157. **Effect of the judgment.** The consequences of a judgment against a defendant in replevin were once of a very serious character, and in modern practice in many places are not unfrequently of more than ordinary importance to him, as they not only concern his property, but place in jeopardy his liberty until the judgment is satisfied.¹ A plaintiff in

¹ 1 Britton C. 28; Mirror C. 2, § 26; Exp. Chamberlain, 1 Sch. & Lef. 320 N.; 3 Bl. Com. 146; Leonard v. Stacy, 6 Mod. 140; Hovey v. Coy, 17 Ma. 266.

replevin is bound by the judgment, though his interest in the property is ignored by the judgment, or is found in favor of his co-plaintiff.¹ A finding in a replevin suit of general ownership in a specified person only determines rights between the parties to that suit, and is confined to the time of the commencement of the suit as to such parties.²

§ 1158. **The same—Illustrations.** Where a constable levied on property and took an indemnity bond, and B. claimed the property and brought replevin in which he was defeated, *held*, that as possession and not title was the issue in the replevin suit, it did not bar B. from a suit on the indemnity bond, and that as the constable in the replevin suit had elected to take the judgment for value instead of the property, his damages were at least the amount of this judgment.³ One who was a surety on a replevin bond given by a defendant in replevin to deliver the property, in which action the property was awarded to the defendant and thereupon returned to him, is not estopped to claim the property by virtue of a chattel mortgage.⁴ A judgment in replevin, where there is no assessment of damages, merely determines the right of possession at the time, and is not inconsistent with the right of the defeated party to recover it back under a change of circumstances.⁵ A replevin suit in which the property is not taken upon the writ, and the plaintiff proceeds for damages, determines the title to the property. The same principles apply to such a case as to an action of trover.⁶

¹ *Ela & another v. Bankes*, 37 Wis. 89.

² *Henry v. Ferguson*, 55 Mich. 399 (21 N. W. 381).

³ *State to use, &c., v. Platt*, 52 Mo. 466. In Missouri replevin will not lie against an officer who has taken indemnity bond. The only question in replevin is, has he taken one, but the law has since been changed and now the taking of the indemnity bond does not bar a replevin suit against him, or the party he represents. *Belkin v. Hill*, 53 Mo. 492. The old law was not repealed as to St. Louis. *Dodd v. Thomas*, 69 Mo. 364.

⁴ *Rathbone v. Boyd*, 30 Kan. 485 (2 P. 664).

⁵ *Pearl v. Garlock*, 61 Mich. 419 (28 N. W. 155); *Deyoe v. Jamison*, 33 Mich. 94.

⁶ *Parmalee v. Loomis*, 24 Mich. 242. See also *Brady v. Whitney*, Id. 154; *Wyman v. Bowman*, 71 Me. 121; *Briggs v. Milburn*, 40 Mich. 512.

Judgment for the return of goods replevied from a buyer by the seller restores to the buyer the possession of the goods, without impairing the seller's rights under the contract.¹ Replevin for property transferred under false representations does not necessarily bar an action for damages for the deceit.² Where an officer, under process against one of several joint owners, took possession of personal property which was replevied by the other joint owners, *held*, that a judgment in favor of the officer is not conclusive as to the ownership of the property, but only that the debtor had an undivided interest in the property, and that the officer was entitled to a return that he might sell it.³

§ 1159. **Judgment in replevin settles the right to possession.** A judgment in replevin in favor of defendant is a solemn legal adjudication that the defendant and not the plaintiff was entitled to the property, and it gives him all legal remedies, not prohibited by statute. To obtain possession of the property or its value he may pursue the bond or bring trover.⁴ A judgment for the plaintiff, in an action of replevin by the mortgagee of the property replevied, conclusively establishes that at the time he brought the action he was entitled to the immediate possession of the property.⁵ Judgment of return is conclusive that the defendant's right of possession is superior to that of plaintiff.⁶

§ 1160. **Non cepit.** In replevin a verdict of *non cepit* and a judgment for return are not conclusive upon the question of property. They only show that for some cause the defendant is entitled to the possession, and such a judgment is not a bar to a suit involving the question of property.⁷

§ 1161. **Non detinet.** Where, upon a plea of *non detinet*

¹ *Adams v. Wood*, 51 Mich. 411 (16 N. W. 788).

² *Lenox v. Fuller*, 39 Mich. 268.

³ *Safford v. Gallup*, 53 Vt. 291.

⁴ *Smith v. Demarris*, 39 Mich. 14.

⁵ *Allen v. Butman*, 138 Mass. 586.

⁶ *Bath v. Miller*, 53 Me. 308.

⁷ *Moulton v. Smith*, 32 Me. 406.

in an action of replevin, the verdict was that the defendant "did unlawfully detain the goods," but was silent as to the ownership, the judgment only decided the right to retain the goods.¹

§ 1162. **Judgment in replevin, how far conclusive.** In replevin, where issues are joined on the pleas of *non-cepit*, *non-detinet*, property in defendant, and that he was entitled to the possession, and judgment is rendered upon a verdict finding the issues for plaintiff, it at least establishes the claim of plaintiff and his right to the possession at the time the suit was brought.² A judgment in replevin is conclusive as to all points directly in issue, and where it is sought to apply the estoppel of a judgment rendered in one cause of action to matters arising in a suit upon a different cause of action, the inquiry must always be as to the point or question actually litigated or determined.³ The record in a replevin cause shows what was found and adjudged by the court, and a party cannot allege and prove in a collateral proceeding that such matters were not determined.⁴

§ 1163. **Bar—Estoppel—Former replevin.** An answer, setting up a former replevin suit as a bar, must show either that the matters in controversy in the present suit were actually determined in the former suit, or that they might have been litigated and finally decided under the issues therein joined.⁵ A judgment in replevin for the plaintiff does not necessarily show that the taking was unlawful.⁶

§ 1164. **Judgment when a bar—What it is a merger of.** A judgment in a replevin suit is a *merger*, not merely of the part brought directly in question in the suit in which

¹ *Emmons v. Dowe*, 2 Wis. 322.

² *Roush v. Washburn*, 88 Ill. 215.

³ *Voge v. Breed*, 14 Bradw. (Ill.) 538.

⁴ *Landers v. George*, 49 Ind. 309; *Fishli v. Fishli*, 1 Blackf. 360; *Day v. Vallette*, 25 Ind. 42; *Crosby v. Jeroloman*, 37 Ind. 264; *Carr v. Ellis*, 37 Ind. 465.

⁵ *Kramer v. Matthews*, 68 Ind. 172.

⁶ *Whitman v. Merrill*, 125 Mass. 127.

the first judgment is recovered, but of the entire cause of action, regardless of the question whether or not the party suing has recovered all which he had the election to bring, and the judgment is a bar to an action of trespass for the taking of the same goods, the original cause of action being *merged* in the judgment.¹ But a judgment against plaintiff in replevin solely for want of demand is no bar to a second action after proper demand, and when so pleaded by defendant, the plaintiff may be allowed to show the facts orally.²

§ 1165. **When conclusive in another replevin action.** Where the court has full jurisdiction of the parties, and the subject of two actions of replevin for the recovery of certain animals and the parties are identical, and the evidence to support both cases is the same, and the defense the same, and the issues in the actions are precisely alike, except that the petition refers to different animals, a judgment in the first case is conclusive between the parties, not only as to that case but also as to the second case.³ One action of replevin is not a bar to another, unless the first was decided upon the merits.⁴ A judgment in replevin, like other judgments, is only conclusive between the same parties and for the same property.⁵

§ 1166. **How far binding in other forms of action.** We have seen that a judgment in replevin is binding in all simi-

¹ *Savage v. French*, 13 Bradw. (Ill.) 17; *Karr v. Barstow*, 24 Ill. 580; *Bennett v. Hood*, 1 Allen, 47; *King v. Hoare*, 13 M. & W. 494; *Kendall v. Stokes*, 3 How. (U. S.) 100; *Freeman on Judgments*, § 241; 1 *Suth. on Damages*, 183 and note 2.

² *Roberts v. Norris*, 67 Ind. 386.

³ *Hoisington v. Brakey*, 31 Kan. 560. See also *Beloit v. Morgan*, 7 Wall. 621; *Perkins v. Walker*, 19 Vt. 145; *Bouchand v. Diaz*, 3 Den. 243; *Gardner v. Bugby*, 3 Cow. 120; *Bent v. Steinburg*, 4 Cow. 559; *Doughty v. Brown*, 4 Comst. 75; *French v. Howard*, 14 Ind. 455; *Carroll v. Woodlock*, 13 Mo. App. 574.

⁴ *Terryll v. Bailey*, 27 Minn. 304 (7 N. W. 261); *Vaughan v. O'Brien*, 57 Barb. 491. The issue tried in replevin cannot be again litigated. *Herman on Estop.* 293-4.

⁵ *Pfienig v. Griffith*, 29 Wis. 618.

lar actions; it now remains to be seen how far it binds in other forms of action. The general rule is that, so far as the same issue is involved in other forms of action, the judgment in replevin is binding. Thus a judgment in replevin is a bar to an action of trover for the same property. It would be vain to allow a party defeated in replevin to bring trover and succeed, thus undoing what had just been done.¹ The effect of a judgment in replevin must depend largely upon the issues made by the pleadings as well as the statute. Where it only, under the issue made, decided the right to possession it has been *held* that it was no bar to trover for the value.² A recovery in replevin is no bar to a subsequent action of trover by the defendant in replevin.³ A constable seized a horse under a chattel mortgage, but the mortgagor recovered it in replevin and then sold it. The mortgagee then brought trover against the purchaser. *Held*, that he was not concluded by the judgment against the constable, even though the latter was his agent and he had acted as attorney for him in the replevin suit.⁴ B. brought replevin against H., who pleaded *non cepit*, whereupon B. submitted to judgment. H. then brought trover against B. for the same property. B. pleaded the judgment in replevin in bar, and H. demurred. *Held*, that the plea was bad. To make the admission of title implied in the plea of *non cepit* an estoppel against H., judgment in the replevin action should have been rendered against him and not in his favor.⁵ Judgment

¹ Bower v. Tallman, 5 Watts & S. (Pa.) 556; Hardin v. Palmerlee, 28 Minn. 450 (10 N. W. 773).

² Lansing v. Sherman, 30 Mich. 49.

³ Robinson v. Kruse, 29 Ark. 575. R. brought replevin against K. for cotton, and judgment went in his favor. He took the property and sold it. K. then sued R. in trover, for the value, and the court held he could recover, but cite no authorities.

⁴ Warner v. Comstock, 55 Mich. 615 (22 N. W. 64). See Wyman v. Bowman, 71 Me. 121.

⁵ Halcomb v. Brickley, 12 R. I. 255; Boilean v. Rutlin, 2 Exch. 605, 681; Hutt v. Morrell, 3 Exch. 240; Carter v. James, 13 M. & W. 137; Sweet v. Tuttle, 14 N. Y. 465; Buck v. Rhodes, 11 Iowa, 348.

in an undefended action of replevin for a note in favor of the maker, which action was brought upon the ground that the note had been obtained by fraud, and in which only the banker having the note for the collection of interest thereon was made a defendant, it was *held*, under the circumstances, not to bar the owner of the note (an indorsee thereof for value before maturity) from maintaining an action thereon against the maker.¹ A judgment in replevin may be shown in mitigation of damages in trespass for the detention of the property.² An action for the recovery of specific personal property is not a bar to an action for trespass.³

§ 1167. **Does not bar a suit in equity to determine the rights of the parties.** In an action of replevin for the recovery of certain cattle, judgment was rendered in favor of the defendant and against the plaintiff for all the cattle, and in the alternative for \$1,948, if a return of all the cattle could not be had. *Held*, that such a judgment is not necessarily a judgment, that the defendant was the absolute, unqualified, and unconditional owner of the cattle, but is consistent with the theory that defendant held as mortgagee of the plaintiff, who was mortgagor, and that it is no bar to an action in equity to settle the matters between the parties.⁴

§ 1168. **Title not determined unless strictly in issue.** The action of replevin is possessory in its character, and unless the title to property is distinctly put in issue, the judgment determines nothing beyond the right of possession; and where the pleadings do not raise the question of title a judgment assuming to settle the title is void, and may be attacked collaterally.⁵ But if the question of ownership is

¹ Waite v. Triplecock, 5 Dill. (8 Circ. Iowa), 547.

² Briggs v. Milburn, 40 Mich. 512.

³ Wauborg v. Karst, 4 Mo. App. 563.

⁴ Armel v. Layton, 33 Kan. 41 (5 P. 441).

⁵ McFadden v. Ross, 108 Ind. 512 (8 N. E. 161); Entsminger v. Jackson, 73 Ind. 144; Kramer v. Matthews, 68 Ind. 172; Highnote v. White, 67 Ind. 596; Hoke v. Applegate, 92 Ind. 570; Van Gorder v. Smith, 99 Ind. 404. See also Davis v. Brown, 94 U. S. 423; Russell v. Place, Id.

raised by the pleadings and there is a special finding on that point, the judgment is conclusive and binding.¹ Where the sale was conditional and a replevin action is brought in which the question of title was directly involved, *held*, that judgment for the plaintiff conclusively settled all questions of title, and the plaintiff could not thereafter bring an action to foreclose any lien the purchaser might have on the property in controversy in the replevin suit.² When the writ and pleadings allege the title to the property replevied to be in the plaintiff, a trial upon the merits determines the ownership and is conclusive against the parties thereto.³

§ 1169. **Judgment in replevin is binding not only on the parties, but their privies.**⁴ A judgment in replevin upon the merits is final and conclusive upon the parties and their privies, and a bar to a subsequent action of replevin.⁵ If one, on being sued for a personal chattel, gives notice to his warrantor to defend the title, the notice makes him privy to the record to the extent to which his rights have been adjudged.⁶ Where a defendant in a replevin suit pleads property in a stranger and it is found for him, such finding is conclusive between the same parties in another suit for the same property. And a title acquired from said stranger,

606; *Campbell v. Consalus*, 25 N. Y. 613; *Goble v. Dillon*, 86 Ind. 327 (44 Am. R. 308); *Munday v. Vail*, 34 N. J. 418, *Fairchild v. Lynch*, 99 N. Y. 359; *King v. Chase*, 15 N. H. 9 (41 Am. Dec. 675); *Wood v. Jackson*, 8 Wend. 9 (22 Am. Dec. 603); *Smith v. McCool*, 16 Wallace, 560; *Bigelow Estop.* p. 92; *Miles v. Walther*, 5 Mo. App. 595.

¹ *McFadden v. Fritz*, 110 Ind. 1 (10 N. E. 120).

² *Campbell Printing Press Co. v. Walker*, 43 Hun. (N. Y. 449).

³ *Farnham v. Chapman*, 60 Vt. 338 (14 A. 690). In this case plaintiff bought a horse of defendant who had replevied the horse from a third party, and who sold it to him before trial of the replevin suit, warranting the title. He was, however, beaten in the replevin suit and his vendee had to surrender the horse and sued on the warranty of title, and defendant claimed that the decision in replevin was not binding on plaintiff in this action.

⁴ *Edwards v. McCurdy*, 13 Ill. 496.

⁵ *Cline v. Gant*, 1 Heis. (Tenn.) 399.

⁶ *Davis v. Wilbourne*, 1 Hill (S. C.), 27.

after the first finding, precludes the party pleading such title from showing a prior title in himself.¹

§ 1170. **Judgment in replevin a bar to a suit for damages between the same parties only.** In replevin suits damages are recoverable. If, therefore, the jury refuse to award them, the verdict is a bar to any other proceeding which seeks to recover damages, but if awarded and not collected, they may be collected in any proper action as against the obligors on an indemnifying bond.² Where a trial in replevin is had all matters growing out of the controversy should be finally determined in that suit; if judgment is against plaintiff, and defendant neglect to have his damages assessed in the replevin action, he cannot afterwards bring his separate suit for the amount of damages suffered.³ Where, on replevin, the defendant is awarded a return and damages he cannot bring a separate suit for the value of the use of the property while in plaintiff's hands.⁴ A judgment in replevin in an action between the owner and the sheriff, who had corraled certain cattle on the ground that they were affected with Texas fever, is no bar to an action by a third party against the plaintiff in replevin for damage for driving the identical cattle through the country whereby the cattle of this third party were infected with Texas fever.⁵

§ 1171. **Judgment conclusive in federal and sister state courts.** The judgment in a replevin suit in a state court is conclusive as to ownership in an action between the same parties, in the federal court, to recover the value of the goods.⁶ A judgment in replevin rendered in a sister state between the same parties upon the same cause of action is as

¹ *Penrose v. Green*, 1 Mo. 774.

² *McAllister v. Clopton*, 60 Miss. 207. A contrary rule was followed in *Colby v. Yates*, 12 Heis. (Tenn.) 267.

³ *White v. Van Houten*, 51 Mo. 577; *Hohenthal v. Watson*, 28 Mo. 360.

⁴ *Davis v. Fenner*, 12 R. I. 21.

⁵ *Boyd v. Moore*, 34 Kan. 119 (8 P. 255).

⁶ *Claffin v. Fletcher*, 10 Biss. 281 (7 F. 851).

conclusive as a bar as in the state where rendered and can be given in evidence under the general issue.¹

§ 1172. **An officer is liable on his official bond for the judgment against him in replevin.** A judgment against a constable for nominal damages and for costs, in an action of replevin of goods attached by him, is a judgment for a malfeasance for which his official bond is liable.²

§ 1173. **A trustee not personally liable.** A judgment in replevin against one suing in an official or representative capacity must be enforced, not as a personal judgment, but against the trust estate.³

§ 1174. **The payment of the money judgment vests the title to the property in the defeated party.** Where the value of the property in dispute is fixed by the verdict, and a judgment is rendered for the value thereof, and such money judgment is paid, the title to the property thereby becomes vested in the party against whom such judgment was given. If a party take a judgment for the value and that is paid, he cannot afterwards claim the property also.⁴ An unsatisfied judgment in replevin is no bar to another suit in replevin for the same property against another defendant, whether the second defendant was a joint trespasser with the first, or a purchaser from him with or without notice.⁵ Where a defendant in replevin obtains a dismissal of the action and an order of restitution, and after accepting from the plaintiffs a deed of certain land in full satisfaction for the replevied chattel, procures a writ of restitution to be issued and executed, he is liable as a trespasser, the property in such chattel being transferred to the plaintiff by such acceptance of satisfaction.⁶

¹ Cannon v. Brame, 45 Ala. 262.

² Tracy v. Warren, 104 Mass. 376.

³ Ranney Adm. v. Thomas, 45 Mo. 111.

⁴ Marix v. Franke, 9 Kan. 132; Adams v. Broughton, 1 Andrews, 18.

⁵ Turner v. Brock, 6 Heiss. (Tenn.) 50; Knott v. Cunningham, 2 Sneed, 204; Lovejoy v. Murray, 3 Wal. 1.

⁶ Archibeque v. Miera, 1 N. M. 419.

§ 1175. **Of two defendants the one who pays takes the title to the property in dispute.** Where two parties are defendant in replevin and the property is not taken, but judgment for its value rendered against them, which one of them pays alone, *held*, that as between the defendants, he who paid the judgment took a perfect title to the property in dispute.¹

§ 1176. **How enforced.** The judgment in replevin must be enforced like any other judgment, although it is in the form of an order to the defeated party to return the property. If he does not do so, he is only liable civilly, as he would be for the non-payment of any other judgment. He is not liable for contempt for failing to obey the order of the court.² The successful party may have a writ of return or special execution commanding the officer to take and return the property. A writ of *retorno habendo* cannot be awarded, unless it appears from the issue tried and the verdict rendered that the plaintiff is not the owner.³ A material variance between the execution and the replevin bond is fatal.⁴ A writ of return cannot run to the sheriff of any county other than that in which the judgment was rendered.⁵ When property levied upon is replevied the lien of the sheriff is gone, but if he succeed and it is found in the possession of the plaintiff in replevin it may be seized on the writ *de retorno*.⁶ Where the pleas were *non cepit*, property in a third person, and justification of the taking, *held*, error to award a *retorno habendo* upon merely a verdict of not guilty.⁷ See next chapter.

§ 1177. **How satisfied.** The final judgment is only satisfied by a return or payment according to its terms. But if the party acquired possession by his own exertion or by

¹ Fox v. Prickett, 34 N. J. 13.

² Hammond v. Morgan, 101 N. Y. 179 (4 N. E. 328).

³ Bourk v. Riggs, 38 Ill. 320.

⁴ Handly v. Rankins, 2 T. B. Mon. (Ky.) 151.

⁵ Rathburn v. Ranney, 14 Mich. 382.

⁶ Acker v. White, 25 Wend. (N. Y.) 614.

⁷ Hanford v. Obrecht, 38 Ill. 493.

craft, it satisfies the judgment of return, as his possession cannot be disturbed. Where the property in an action for the recovery of personal property is taken from the defendant and redelivered to him on his giving bond, his possession of it is not qualified by the bond he gave to secure the redelivery, and if plaintiff dismiss the action no order for the return is necessary. The possession of the defendant becomes absolute in his own right and the bond *functus officio*.¹ Or part may be returned and value paid for part; the part returned will be satisfaction *pro tanto*. Where a judgment is rendered for a return of a number of hogs or their value at \$4 per head, and the sheriff returns such part of the hogs as he is able to find, an execution for the value of those not returned at \$4 per head may be enforced.² Where the judgment shows the value of each article separately, the officer can seize and return such as he can find and levy generally for the balance due.³ If the defendant give bond and refuse to surrender the property, he cannot afterwards surrender it in discharge of the action, or satisfaction of the judgment against him for its value.⁴ Where goods are not taken, but are detained by defendant, he cannot satisfy a judgment against him in replevin by giving up the property and paying costs, etc. *Retorno habendo* has no existence, except where the goods have been replevied and verdict is for defendant.⁵

§ 1178. **In conclusion—Summary.** The judgment in replevin has the same force and effect as a judgment in any other form of action. If the title is involved the adjudication is final as to title, and if the money judgment for value is paid and discharged it amounts to a transfer of the title to the defeated party. If the title is not involved, the adjudication is conclusive as to the right of possession at the commencement of the action between the parties to the ac-

¹ Hackett v. Bonnell, 16 Wis. 471.

² Black v. Black, 74 Cal. 520 (16 P. 311).

³ Knox v. Noble, 25 Kan. 453.

⁴ Fisher v. Whoollery, 25 Pa. St. 197.

⁵ Schofield v. Ferrers, 46 Pa. St. 434.

tion and their privies, under the circumstances existing at that time. It is conclusive and final on the subject of damages or other secondary matters necessarily involved in the litigation of the main question—the right of possession; but as we shall presently see the judgment in replevin is subject to appeal or proceedings in error as in any form of action.

CHAPTER XXXVII.

WHAT IS A PROPER RETURN OF THE PROPERTY.

	Section.		Section.
<i>Retorno habendo</i> . . .	1179	Where property has been sold and replaced by other of same kind . . .	1187
Officer must take and deliver the property under such an order	1180	The successful party may wait until the property is tendered him	1188
Return not always ordered .	1181	An actual return will alone satisfy the judgment of return	1189
Duty of party in possession when return is awarded .	1182	And a tender of property must be kept good to have the effect of satisfying the judgment—Sheriff's return conclusive	1190
Property should be returned to the custody from which taken	1183	The effect of a return is to satisfy the judgment of return or value	1191
What constitutes a return or tender of return . .	1184		
What is a proper return under the order—In case of attached property—What officer	1185		
To whom the property is to be returned on a writ of <i>retorno habendo</i> . . .	1186		

§ 1179. **Retorno habendo.** As we have seen where the result of the trial is against the party in possession, the court orders a return, or in default of a return a judgment for a certain sum of money equal to the value of the property. Under the general rule of practice, to which there are but few statutory exceptions, the money judgment is held in abeyance until it is shown that a return cannot be had, that is, the money judgment does not become a valid subsisting judgment, capable of being enforced, until it is shown that a return of the property cannot or will not be made. It now becomes an important question to decide what is a proper return or tender of return of the property, and under what

circumstances the successful party may proceed to collect his money-judgment. In most of the states there is no writ of *retorno habendo* as at the common law, the judgment being entered, that unless the party in possession, usually the plaintiff, return the property, he pay the money-judgment. As he was the moving party in seizing the property, this imposes upon him the duty of taking active steps for its return, if he would escape the payment of the money-judgment. The successful party may stand still and receive the property, or if it is not tendered to him, may proceed to collect his money-judgment, though he is not bound to do this, but may seize the property wherever he can find it. Or he may have a writ put in the hands of the officer, called a special execution for want of a better name, which commands the officer to take and return the property. This writ should describe the property as it is described in the finding and judgment, though under the common law the sheriff was not obliged to deliver the goods upon a writ of *retorno*, unless they were "shown to him." If there was any question about their identity,¹ and "none came to show the beasts," was a good return and excuse for not obeying the writ.²

§ 1180. **Officer must take and deliver the property under such an order.** On a judgment of return to defendant, where an execution issued commanding the officer to take the property from the plaintiff in that action, or *in whose hands soever the same might be within his county*, and deliver the same to the defendant, or if that was impossible, then that he should satisfy the judgment as to the value by levy, etc., it is the duty of the sheriff to take and deliver the property, whether he finds it in the hands of plaintiff or some other person, unless that other person has a title to it superior to the party to whom he is commanded to deliver it; and if he fail to do this and return that he can not take it

¹ Taylor v. Wells, 2 Saund. 74 b.

² Wilson v. Gray, 8 Watts (Pa.), 34; Bacon's Abr. title Replevin, H.

and deliver it because it is in the hands of a stranger, he is liable for a false return upon his official bond.¹ A writ was issued commanding the sheriff to take from the defendant, in an action of replevin, a certain mule for the delivery of which the plaintiff in the action had obtained judgment. The mule was found in the possession of one who had purchased it from the defendant in replevin, while the action was pending, and with actual notice of the litigation. *Held*, that the purchase of the mule was at the peril of the buyer, who must abide the result of the action the same as the defendant therein, and it was the duty of the sheriff in executing the writ to take the animal from the purchaser, although he had paid full value for it.² The sheriff's powers under a writ of return are as great or greater than under the writ of replevin.

§ 1181. **Return not always ordered.** The ordering of a return is a matter largely within the discretion of the court, and the power will only be exercised in furtherance of justice.³ Where there has not been a trial on the merits the court should use great care in exercising this power, and should, where necessary, inquire into the facts far enough to act intelligently.⁴ Where a party who cannot maintain the action brings it, a return must be ordered.⁵ This power is exercised on the theory that a party should not be allowed to acquire a better title by an abortive attempt to replevy or by failure in the action than he had before; that nothing but a trial of the issue of title and right of possession will suffice to change the relations of the parties to the property

¹ Hoffman v. Conner, 76 N. Y. 121.

² Swantz v. Pillow, 50 Ark. 300.

³ Fowler v. Hoffman, 31 Mich. 221; Plant v. Crane, 7 Port. (Ind.) 486; Bartlett v. Kidder, 14 Gray, 450; Wheeler v. Train, 4 Pick. 168; Saffell v. Wash, 4 B. Mon. (Ky.) 92; City of Bath v. Miller, 53 Me. 317.

⁴ Mikesill v. Chaney, 6 Por. (Ind.) 52; Lowe v. Brigham, 3 Allen (Mass.), 430; Tuck v. Moses, 58 Me. 474; Smith v. Aurand, 10 S. & R. (Pa.) 92; Goodheart v. Bowen, 2 Bradw. (Ill.) 578; Bourk v. Riggs, 38 Ill. 320; Whitwell v. Wells, 24 Pick. 33.

⁵ Crabtree v. Clapham, 67 Me. 326.

so far as legal proceedings are concerned.¹ The exercise of this power is bounded by well defined rules. Property cannot be returned to a person from whom it was never taken or to a stranger to the suit.² If plaintiff is nonsuited because defendant never had possession, it would be wrong to render a judgment for return;³ see chap. on judgment. In actions between joint owners, where it is held that the action cannot be maintained, a return must be ordered, or the plaintiff, though not entitled to sue, would derive the same benefit as if he had rightfully brought the action.⁴ Plaintiff is under no obligations to return the property, unless ordered to do so by the court as a result of his proceedings.

§ 1182. **Duty of party in possession when return is awarded.** The obligation of a replevin bond, where a return of the property has been adjudged, imposes the duty of taking active measures to surrender the property, and not simply the passive submission to a forcible taking by legal process.⁵ It is the duty of plaintiff, when a return is ordered, to take active measures to redeliver the goods to the defendant in the same condition as when taken,⁷ and such delivery by him is a waiver of other claims to the possession of the property so delivered.⁶ Where the one holding the property pending the litigation is defeated, and judgment for a return is entered against him, it is his duty to seek the other party and deliver the property to him, if he will receive it. If he fail to do this, there is a breach of the bond for which he and his sureties are liable. But where he sues out a writ

¹ Hall v. White, 106 Mass. 600; Whitwell v. Wells. 24 Pick. 33.

² Richardson v. Reed, 4 Gray, 441.

³ Gallagher v. Bishop, 15 Wis. 277.

⁴ Mason v. Sumner, 22 Md. 312; Witham v. Witham, 57 Me. 447.

⁵ Clark v. Norton, 6 Minn. 415; Ladd v. Prentice, 14 Conn. 117; Way v. Barnard, 36 Vt. 366.

⁶ Jennison v. Haire, 29 Mich. 207.

⁷ Parker v. Simmonds, 8 Met. 207; Berry v. Hoeffner, 56 Me. 171. See Washington Ice Company v. Webster, 62 Me. 363; Allen v. Fox, 51 N. Y. 562.

⁸ Rich v. Savage, 12 Neb. 413 (11 N. W. 863).

to get possession of the property, and on the property being seized and tendered him refuses to receive it, the judgment of return is satisfied.¹

§ 1183. **Property should be returned to the custody from which taken.** Where property was replevied out of the hands of an officer, who held the same upon process issued in behalf of the defendant in replevin, a return of it to the same custody from which taken would be a sufficient return to the defendant.² Where the property replevied was a steam engine and appurtenances which were not moved by the officer serving the writ, and on the trial were still remaining where levied on, and the plaintiff, who was defeated, told the officer he wished to return the property, the officer refused to accept this as a compliance with the judgment, and got out an execution to collect the alternative judgment, the levy of the execution was enjoined, the court holding that in this bulky property and under the facts the offer to return was a compliance with the judgment for the return of the property.³

§ 1184. **What constitutes a return or tender of return.** In replevin on a judgment for defendant, if the sheriff take possession of the property, this is a lawful return to the defendant, and a substantial compliance with the conditions of the replevin bond.⁴ If an action of replevin is dismissed for informality in the replevin bond, and judgment of return given for the defendant, and plaintiff returns the property to the place from which he first took it, he may bring another action of replevin for the same property against the same defendant, although the defendant had not actually received the property under the judgment in the first action.⁵ On a judgment against the plaintiff in the alternative for a return or for its value as found by the court, an offer and tender of

¹ *Douglass v. Douglass*, 21 Wallace, (U. S. S. Ct.) 98.

² *Osborne v. Banks*, 46 Conn. 444.

³ *Frey v. Drahos*, 10 Neb. 594 (7 N. W. 319).

⁴ *Carrico v. Taylor*, 3 Dana. (Ky.) 33.

⁵ *Walbridge v. Shaw*, 7 Cush. (Mass.) 560.

the property at the place where replevied, is good.¹ Where a portion of the property has been lost or destroyed, and its separate value has been found by the court, such value in money, together with the remaining goods, may be tendered.² In a replevin suit S., an officer, was awarded possession against the plaintiff M. B., M.'s bondsman, took the property and delivered it to S. under the judgment. R., who claimed to have bought from M. pending the litigation, immediately brought another replevin against S.; *held*, that R. was bound by the decision in the first case, and that B., who had a chattel mortgage on the property made by R., thereby surrendered his claim under the mortgage.³

§ 1185. **What is a proper return under the order—In case of attached property—What officer.** Where attached property was replevied from constable Mower, and before the decision in the replevin case, which was against plaintiff and for a return, the attachment suit had proceeded to judgment, and an execution been issued thereon and placed in the hands of constable Warren, and plaintiff in replevin returned the property to Warren instead of to Mower, *held*, that this was a proper return and released plaintiff in replevin, as it could be sold to satisfy the attachment as well under the execution as under the attachment, and that plaintiff was released by this return no matter what became of the property in Warren's hands.⁴

§ 1186. **To whom the property is to be returned on a writ of retorno habendo.** Where goods levied on by a sheriff, and held by him under an execution, are taken from his custody by writ of replevin, they can be rightfully returned to him alone upon a writ of *retorno habendo*. The plaintiffs in execution, having never had the goods in possession, are

¹ Reavis v. Horner, 11 Neb. 479 (9 N. W. 643); Pickett v. Bridges, 10 Hump. 171.

² Reavis v. Horner, 11 Neb. 479 (9 N. W. 643); Pickett v. Bridges, 10 Hump. 171.

³ Rich v. Savage, 12 Neb. 413 (11 N. W. 863).

⁴ Richards v. Rape, 3 Bradw. (Ill.) 24.

not entitled to have return thereof made to them, but they must be returned to the sheriff, to be applied in satisfaction of the execution in his hands.¹ A return to his successor in office, or in executing the writ, would probably be within the meaning of these cases.

§ 1187. **Where property has been sold and replaced by other of same kind.** Where a marble yard was replevied against a distress for rent, and was run by the plaintiff pending the suit, marble being sold and other purchased in its place, on a judgment for a return a tender of what was on hand of the original marble, and that of equal value in lieu of that sold or lost, was held to release the sureties on the bond.² The usual rule is that the tender of return must be of the identical property taken, and if other property is tendered back the defendant is not bound to take it in satisfaction of the judgment.³

§ 1188. **The successful party may wait until the property is tendered him,** and if tender is not made according to the order of the court or within a reasonable time, if the time is not fixed in the judgment of return, he may enforce his alternative or money-judgment, but he is not bound to do so, and may take the property wherever he can find it.⁴

§ 1189. **An actual return will alone satisfy the judgment of return.** The party to whom the return is ordered to be made must derive some substantial advantage therefrom; a fraudulent or pretended return is no return in law.⁵ The offer of return must be unconditional,⁶ and the acceptance of it must be unconditional.⁷ Thus, where the court

¹ Blatchford v. Boyden, 122 Ill. 657 (13 N. E. 801); Richardson v. Reid, 4 Gray. 441; Grace v. Mitchell, 31 Wis. 553; Mitchell v. Roberts, 50 N. H. 486.

² Sands v. Fritz, 84 Pa. 15.

³ Irvin v. Smith, 68 Wis. 227 (31 N. W. 912).

⁴ Kayser v. Bauer, 5 Kan. 202.

⁵ Rich v. Savage, 12 Neb. 413 (11 N. W. 863).

⁶ Tompkins v. Batie, 11 Neb. 147 (7 N. W. 747).

⁷ Williams v. Eikenbarr, 22 Neb. 211 (34 N. W. 373).

ordered a return of the property and afterward rescinded the order and had the property placed back where it was, such return is no return and does not satisfy the final judgment or release the sureties.¹ Plaintiff cannot say he surrenders and returns it, but in fact still hold it by a keeper; he must make a *bona fide* return and release all control over it. Where the property replevied is left where taken, the fact that plaintiff's attorney wrote defendant, after final judgment in defendant's favor, that plaintiff did not claim it, is not a sufficient return if, in fact, plaintiff still kept an agent in charge of the property.²

§ 1190. **And a tender of property must be kept good to have the effect of satisfying the judgment—Sheriff's return conclusive.** Where the defendant in replevin had judgment for a return of the property, or if a return could not be had, for its value, and an execution has been issued and levied on other property, on motion recalling the execution, plaintiff cannot have judgment declaring such former judgment satisfied, except upon satisfactory proof and a finding that such judgment has been fully satisfied by a return of all the property to the defendant, or that they offered to return it to him personally; and if such tender was made before the execution issued, it must have been kept good. And where the sheriff has returned that a return of the property could not be had it cannot be contradicted on the motion to recall the execution.³

§ 1191. **The effect of a return is to satisfy the judgment of return, leaving only the costs and damages to be discharged, to entitle the party to a full satisfaction; that is, the judgment for value and interest is canceled by the return as well as the judgment of return.**⁴ And a proper offer to

¹ *Robins v. Foster*, 20 Mo. App. 519. See *State, ex rel. Calvin, v. Six*, 80 Mo. 61.

² *Bank v. Hall*, 107 Pa. 583.

³ *Irvin v. Smith*, 66 Wis. 113 (27 N. W. 35 and 28 N. W. 351). Same case again in 68 Wis. 220 (31 N. W. 909).

⁴ *Smith v. Roby*, 6 Heis. (Tenn.) 546.

return if kept good would have the same effect. Where a proper offer to return has been made and not accepted, courts will restrain by injunction the enforcing of the money judgment.¹

¹ *Reavis v. Horner*, 11 Neb. 479 (9 N. W. 643).

CHAPTER XXXVIII.

DISMISSAL—NONSUIT AND REINSTATEMENT.

	Section.		Section.
A nonsuit did not bar another action at common law	1192	tion to be dismissed, it will not be reinstated	1204
Plaintiff cannot dismiss to the detriment of the other party	1193	Dismissal for defects in the affidavit	1205
The same	1194	Judgment of return on nonsuit	1206
Neither can he dismiss as to a part of the property if it is claimed by defendant . .	1195	When limited to value of special interest	1207
The same	1196	On a nonsuit, judge may be compelled to award proper judgment	1208
But if defendant has retained the property, plaintiff may dismiss	1197	If the court has no jurisdiction, return cannot be awarded	1209
The rule as to damages on dismissal	1198	If the court has jurisdiction, neither party can dismiss .	1210
Where writ is quashed, judgment for return or value is proper	1199	The action should not be dismissed on slight grounds .	1211
But if defendant claim further relief, the plaintiff should be heard before judgment is entered . . .	1200	Right to dismiss lost if not acted upon in time . . .	1212
Court should compel plaintiff to prosecute diligently .	1201	Where proceedings in an action of replevin are stayed by injunction	1213
Defeated party cannot appeal and then dismiss	1202	Agreement to arbitrate—When a dismissal	1214
If a nonsuit is the result of an appeal, a return should be awarded	1203	Defendant may stipulate for a dismissal	1215
Where plaintiff allows his ac-		Effect of judgment for a return	1216
		Effect of judgment of dismissal	1217

§ 1192. Under the common law a nonsuit suffered by the plaintiff did not debar him from bringing another action and

having another writ for the same property.¹ The English statute,² which restrains the plaintiff from a second replevin, is only local in its application,³ and permits him to proceed by a writ of second deliverance, thus accomplishing the same purpose. Judgment of nonsuit or discontinuance does not bar the plaintiff from another action for the same cause.⁴ And the general rule in this country is that in order to be a bar there must be a trial upon the merits. See Chap. XXXVI.

§ 1193. **Plaintiff cannot dismiss to the detriment of the other party.** He cannot dismiss his suit so as to avoid a hearing as to the value or the damages. Where such purpose is apparent, it is the duty of the court to retain the case and hear and determine the questions as to damages and a return of the property.⁵ Where the property is taken, replevin differs from all other actions in this respect, that both parties are actors, and as the plaintiff had taken property from the possession of defendant, the law will not permit him to dismiss the action out of court over the objection of defendant. In such a case the court will retain jurisdiction at the request of the defendant until it has put him in the same position he was before the action was brought, by returning the property to him.⁶ Ordinarily the plaintiff has a right to dismiss his action, but in replevin, after the property has been delivered to plaintiff, the position of the parties becomes, to all practical intents and purposes, reversed, and the law will

¹ 3 Inst. p. 9, 3 Blackstone 274-287; *Baker v. Phillips*, 4 Johns. 190; *Evans v. Brander*, 2 H. Bla. 547.

² Stat. West. 2d, 13 E. 1 C. 2.

³ *Doggett v. Robins*, 2 Blackf. 418.

⁴ *Hackett v. Bonnell*, 16 Wis. 471; *Westcott v. Back*, 2 Col. 335.

⁵ *Ranney v. Thomas*, 45 Mo. 112; *Berghoff v. Heckwolf*, 26 Mo. 512; *Mikesell v. Chaney*, 6 Port. (Ind.) 52.

⁶ *Marshall v. Bunker*, 40 Iowa, 121; *Berry v. O'Brien*, 103 Mass. 521; *Dawson v. Wetherbee*, 2 Allen (Mass.), 462; *Mason v. Richards*, 12 Iowa, 74; *Wilkins v. Treynor*, 14 Iowa, 393; *Fleet v. Lockwood*, 17 Conn. 233; *Ranney v. Thomas*, 45 Mo. 112; *Broom v. Fox*, 2 Yeates (Pa.), 530; *Waldmon v. Broder*, 10 Cal. 379; *Hall v. Smith*, 10 Iowa, 45.

not permit the plaintiff to reduce the property to possession by means of this writ and then prevent an adjudication of its status by dismissing his suit. A plaintiff in replevin, after taking the property, cannot dismiss the suit.¹ The court will retain the cause, hear defendant's proof, and render an appropriate judgment.² The plaintiff in replevin cannot, by a discontinuance of the action or by suffering a nonsuit, prevent a judgment being rendered against him for damages or for a return of the property; such act on his part merely amounts to an abandonment of the action by the plaintiff with the consent of the court, and does not affect defendant's rights or the jurisdiction of the court.³ When the plaintiff does so dismiss the suit, the defendant may retain it or have it reinstated for the purpose of having these issues determined. In such cases the plaintiff is regarded as in default.⁴ The order for return must be made at the time of the dismissal; it cannot be made at a subsequent term.⁵ The right to the return should be determined in the replevin suit and not left to a subsequent suit.⁶ Where the suit is dismissed, or for other reasons the plaintiff fails to maintain his action, the court should return the property to the defendant or take such other steps necessary to place the parties and property *in statu quo*.⁷

§ 1194. **The same.** In an action of claim and delivery it is not competent for the plaintiff, after the property has

¹ Aultman v. Reams, 9 Neb. 487 (4 N. W. 81).

² Ahlman v. Meyer, 19 Neb. 63 (26 N. W. 584).

³ Brannin v. Bremen, 2 N. M. 40.

⁴ Wilkins v. Treynor, 14 Iowa, 393; Kimmel v. Kint, 2 Watts (Pa.), 432. In some states no order of return is made, but the plaintiff is liable on his bond for the return or their value—Wiseman v. Lynn, 39 Ind. 254; Sanderson v. Lace, 1 Chand. (Wis.) 231; Savage v. Gunter, 32 Ala. 469—but the more general as well as the better rule is as given in the text.

⁵ Lill v. Stookey, 72 Ill. 495.

⁶ Harman v. Goodrich, 1 Green. (Iowa) 25; Mills v. Gleason, 21 Cal. 274.

⁷ Boom v. St. Paul, &c., 33 Minn. 253 (22 N. W. 538).

been put into his possession, to move a dismissal, and if he refuse to plead or further proceed with the action, an alternative judgment should be rendered against him for the return of the property or its value.¹ Plaintiff in replevin will not be allowed to dismiss his suit before the hearing of testimony as to the value of the property delivered to plaintiff, so that a proper judgment may be rendered for defendant.² Where a stranger to the title brings replevin, gets possession of the property, and then dismisses the action, judgment for its full value should be rendered against him, and he cannot show no title or limited interest in defendant.³

§ 1195. **Neither can he dismiss as to a part of the property if it is claimed by defendant.** It is error for the court to allow plaintiff to strike out of his petition a part of the property when defendant is claiming the return of that property. In replevin both parties are actors, and the issues tendered must be tried.⁴ Where the bond given for a return only covers part of the property replevied the suit should be dismissed as to the property not covered by the bond.⁵ But where the property described in the writ is not taken, but other property, and the writ is dismissed, no ground for the assessment of damages exists.⁶

§ 1196. **The same—Defendant has choice of remedies.**

¹ *Manix v. Howard*, 82 N. C. 125; *Perry v. Tupper*, 70 N. C. 538; *Dulin v. Howard*, 66 N. C. 433; *Wilson v. Wheeler*, 6 How. Prac. 59.

² *Ranney v. Thomas*, 45 Mo. 111; *Berghoff v. Heckwolf*, 26 Mo. 512.

³ *Nelson v. Luchtemeyer*, 49 Mo. 56. Plaintiff brought this action for the use of others, under a trust deed, and by mistake claimed property not referred to in the instrument. The decision is of course influenced by the statute which provides, that if a plaintiff "fails to prosecute his action with effect, and without delay, and shall have the property in his possession, and the defendant, in his answer, claims the same and demands a return thereof, damages shall be assessed against the plaintiff for the value of the property and for incidental injuries resulting from the taking." 2 Wag. Stat. 1026, § 11.

⁴ *Howell v. Foster*, 65 Cal. 169.

⁵ *Eastman v. Barnes*, 58 Vt. 329 (1 A. 569).

⁶ *Parsell v. Genesee Circuit Judge*, 39 Mich. 542.

A plaintiff in a replevin action may, notwithstanding he has obtained possession of the property under the writ, at any time before a final submission, dismiss such action without prejudice. Notwithstanding such dismissal, the defendant may, unless the property be restored to him, have his rights of property and possession inquired into and determined by the court; on such a dismissal the court should order a return and adjudge costs against plaintiff.¹ While a defendant may, where a plaintiff dismisses an action of replevin, as a matter of right, have his interest in the replevied property adjudicated, and in case he does this is bound by that adjudication, this is not his exclusive remedy; he may sue on the bond.² When a plaintiff suffers a discontinuance in replevin, the defendant may elect whether he will claim or waive a return.³ Plaintiff in replevin, who was defeated and appealed from justice court, has a right to dismiss his case, and the defendant, upon such discontinuance, may elect to have a return, or upon notice an assessment of the value in lieu of a return.⁴ A demurrer having been sustained to a petition in replevin, the defendant was entitled at his election to take a money judgment for the value of the property, or an order for a return.⁵

§ 1197. **But if defendant has retained the property, plaintiff may dismiss.** In replevin, where the property has been taken and redelivered to defendant on his giving a bond, the plaintiff may discontinue.⁶ In such a case the suit is really but an ordinary personal action, and by the dismissal the defendant is not injured or placed in any worse light than he was. The reason for the rule heretofore announced does not exist, and the rule does not apply.

§ 1198. **The rule as to damages on dismissal is not**

¹ *McVey v. Burns*, 14 Kan. 291; *Higbee v. McMillan*, 18 Kan. 133.

² *Manning v. Manning*, 26 Kan. 98.

³ *Wheeler v. Wilkins*, 19 Mich. 78.

⁴ *Soper v. Hawkins*, 56 Mich. 527 (23 N. W. 206).

⁵ *Armél v. Lendrum*, 47 Iowa, 535.

⁶ *Hackett v. Bonnell*, 16 Wis. 471.

quite so clear as the rule that the property shall be returned. Where the goods were ordered returned for informality in bringing the suit, without any investigation into the merits, and defendant asked also an assessment of damages, the court denied his request, saying that the disputed questions of title were not determined, and that damages (beyond nominal) should not follow the plaintiff's failure to sustain his suit for mere irregularity.¹ So where the writ was abated and the property ordered returned, the court refused to assess damages upon the ground that there was no issue upon which they could be estimated.² It would seem that it was proper for the court in such cases to hear evidence offered, and if from all the facts it appear that the defendant has avoided a trial upon the merits, and that the plaintiff fails from a mere irregularity when he otherwise would be likely to succeed, damages beyond costs should rarely be awarded.³ If the action is dismissed for technical defects in the proceeding, which would have prevented a trial on the merits, no assessment of damages can be made. It is the duty of the court in such a case to return the property to the defendant and give him nominal damages only, as the plaintiff is not precluded in such a case from bringing another action to determine his right to the property.⁴ When the plaintiff fails to make out a case, it is proper for the court to enter a nonsuit and proceed to assess defendant's damages.⁵ A plaintiff in replevin has a right to dismiss the action without leave of court; on such dismissal the defendant is entitled to judgment as upon issue found against the plaintiff.⁶

§ 1199. **Where writ is quashed judgment for return or value is proper.** Where property is taken under a writ, (and described in the writ) and the writ is quashed because

¹ Callomer v. Page, 35 Vt. 396.

² McArthur v. Lane, 15 Me. 245.

³ Pierce v. Van Duyke, 6 Hill (N. Y.), 613.

⁴ Barruel v. Irwin, 2 N. M. 223.

⁵ Bath v. Ingersoll, 1 Wyo. 280.

⁶ Maxey v. White, 53 Miss. 80.

it is for an interest that cannot be taken in replevin, the defendant is entitled to a judgment for the value or for a return.¹ Where an action of replevin is dismissed for want of a proper bond, and the property is still in the custody of the officer, he should be ordered to return it to defendant at the place from which he took it.² It is held in Rhode Island that, on dismissal for defective service or want of proper bond on defendant's motion, the court had no jurisdiction to order a return of the property.³ If, in a replevin suit, the plaintiff has given bond and obtained the property, and the writ be quashed and the suit abate, judgment should be entered for the return of the property, and a writ of inquiry awarded to ascertain its value and assess the damages, the same as in case of a nonsuit.⁴

§ 1200. But if defendant claim further relief, the plaintiff should be heard before judgment is entered. Where, in an action of replevin, the plaintiff dismisses his petition before an answer is filed, the defendant is nevertheless to have a judgment for his interest in the property replevied. But if he file an answer, notwithstanding the dismissal, claiming other and further relief, the plaintiff should be allowed to plead thereto, and introduce evidence upon the issues thus raised.⁵

§ 1201. Court should compel plaintiff to prosecute diligently. In replevin, where the plaintiff has obtained the property, the court is justified in requiring of him a prompt obedience to its orders made for the purpose of securing a speedy trial, and if not obeyed, rendering judgment for defendant as if plaintiff had abandoned the case.⁶

¹ *Humphrey v. Bayn*, 45 Mich. 565 (8 N. W. 556). This was replevin for one-third of seventeen thirty-seconds of a lot of wheat, and writ was quashed on ground that the parties were tenants in common. *Fryer v. Fryer*, 6 Dana. (Ky.) 54.

² *Thurber v. Richmond*, 46 Vt. 395.

³ *Smith v. Fisher*, 13 R. I. 624; *Sanders v. Goodwin*, 13 R. I. 145.

⁴ *Kendrick v. Watkins*, 54 Miss. 495.

⁵ *Crist v. Francis*, 50 Iowa, 257.

⁶ *Becker v. Becker*, 50 Iowa, 139.

§ 1202. **He cannot appeal and then move to dismiss the suit for defects.** Where a defendant in a replevin suit appeared at the trial before the justice and appealed from a judgment against him, it is his duty to perfect the appeal by filing all necessary papers, and he cannot properly move the court to dismiss plaintiff's suit because of the omission of the replevin bond from the papers filed with the transcript.¹

§ 1203. **If a nonsuit is the result of an appeal, a return should be a warded.** Where, on a trial on appeal from a justice's court, a nonsuit is granted, an affirmative judgment may be rendered for the redelivery of the property or its value, and damages for its detention.²

§ 1204. **Where plaintiff allows his action to be dismissed it will not be reinstated** at a subsequent term of the court, without the reasons excusing his act are very strong and clear and the default was beyond his power to prevent. When plaintiff brings an action of replevin and seizes property, it is his imperative duty to be on hand ready to show up his title and claim to possession.³

§ 1205. **Dismissed for defects in the affidavit.** Dismissal of a writ of replevin on account of defects in the affidavit amounts to judgment of nonsuit, and in such case defendant's damages should be assessed.⁴ When a replevin is dismissed for want of a declaration, and judgment rendered against the plaintiff for costs, the court should award a writ of *retorno habendo*, but if it fail to do so it cannot be done at a subsequent term.⁵ Where the writ is quashed for a defect in the affidavit, and thereupon the cause is dismissed by the plaintiff, the question of title to the property in dispute

¹ McArthur v. Howett, 72 Ill. 358.

² Fugina v. Brownlie, 65 Wis. 628 (27 N. W. 408).

³ French v. Venable, 2 Cranch. C. Ct. 509; Williamson v. Bryan, 2 Id. 407; McLeod v. Gloyd, 2 Id. 264; Sherborne v. King, 2 Id. 205; McDermott v. Naylor, 4 Id. 527; Thompson v. Wells, 3 Cranch. C. Ct. 5; McDaniel v. Fish, 2 Cranch. C. Ct. 160; Nicholls v. Hazel, 2 Cranch. C. Ct. 95.

⁴ Stall v. Diamond, 37 Mich. 429.

⁵ Lill v. Stookey, 72 Ill. 495.

is not settled.¹ Defects in either the affidavit or bond should be reached by motion to quash the writ, and are not ground for dismissal where the court had jurisdiction to issue the writ.²

§ 1206. **Judgment of return on nonsuit.** If, for any reason, the plaintiff fail to prosecute his suit to effect, as by submitting to a nonsuit on failure to plead over, on sustaining of a demurrer to his former plea, a return should be awarded.³ Where plaintiff took a voluntary nonsuit, defendant was entitled to a judgment for a return of the property. In case of a nonsuit before the defendant has had an opportunity to plead, he shall have return without an avowry.⁴

§ 1207. **When limited to value of special interest.** On granting a nonsuit in an action for the unlawful detention of personal property, the real question litigated is the right of possession; though the evidence show that plaintiff is the owner, yet if it fail to show that he is entitled to possession, the court should assess and enter in the alternative judgment the value of defendant's special interest only, and not the value of the whole property.⁵

§ 1208. **On a nonsuit judge may be compelled to award proper judgment.** Where the service of the writ of replevin is set aside it amounts to a discontinuance, and the judge may be compelled by mandamus to proceed to hear evidence and assess defendant's damages, if he elect to have damages rather than a return.⁶

§ 1209. **If the court have no jurisdiction return cannot be awarded.** Where the action is dismissed on the ground that the court had no jurisdiction, a return of the property

¹ Stockwell v. Byrne, 22 Ind. 6.

² Fawcner v. Baden, 89 Ind. 587.

³ Kimball v. Citizen's Bank, 3 Bradw. (Ill.) 320.

⁴ Timp v. Dockham, 32 Wis. 146; Story's Plead. (Oliver's Ed.) 445.

⁵ Gaynor v. Blewitt, 69 Wis. 582 (34 N. W. 725).

⁶ Forbes, *ex rel.*, v. The Judge, &c., 23 Mich. 497; People v. Tripp, 18 Mich. 518; Lickfelt v. Kopp, 38 Mich. 313.

cannot be awarded.¹ This refers to jurisdiction to issue the writ, as if it was issued by a mayor's court which, by statute, had not the power to hear such cases. If it be dismissed for any other reason, the court would still have power to render the proper judgment. Thus, if the action be dismissed for some defect in service, or any other reason than that of jurisdiction over the subject matter, the rule is different, and the court should order a return.² Replevin cannot be brought for property held under execution, and, after a delivery of the property, be dismissed on the motion of plaintiff, on the ground that the statute prohibits the replevin of property held under execution. The court will have jurisdiction to make the proper order against plaintiff.³ Where a person illegally assumed to be a justice and issued a writ in replevin, and defendant came in and took a change of venue to a legal justice, he waived the error, and the legal justice has jurisdiction to try and dispose of the case, and it cannot be dismissed by plaintiff.⁴

§ 1210. **If the court have jurisdiction neither party can dismiss.** In a replevin action, after the court has acquired jurisdiction, it is not within the power of either party to withdraw without the consent of the other, so as to prevent a final determination of the right to the possession of the property as between them.⁵ Where property has been taken under a writ of replevin, either party may have the right to the possession determined, and a dismissal of the action by the other will not deprive him of that right.⁶

§ 1211. **The action should not be dismissed on slight grounds.** It is not error to refuse to dismiss a possessory

¹ Gray v. Dean, 136 Mass. 128; Jordan v. Dennis, 7 Met. 590; Burdell v. Doty, 38 F. 491.

² Gray v. Thrasher, 104 Mass. 373; Lowe v. Brigham, 3 Allen, 429; Briggs v. Humphrey, 1 Allen, 371; Davenport v. Burke, 9 Allen, 116; Jaques v. Sanderson, 8 Cush. 271; McInery v. Samuels, 125 Mass. 425.

³ Rood v. Hurd, 41 Conn. 321.

⁴ Graves v. Shoefelt, 60 Ill. 462.

⁵ Abren v. Brown, 2 N. M. 11.

⁶ Moore v. Herron, 17 Neb. 697 (24 N. W. 425).

warrant on the ground that it was not issued by the judge before whom the affidavit was made.¹ It is no ground for dismissing a writ of replevin that two cows are appraised at one sum.² In a summary proceeding, such as a motion to quash a writ of replevin, the evidence to authorize a court to set aside its process ought to be clear and satisfactory.³ Where an action of replevin is rightfully brought, dismissal as to one defendant does not give the other defendant a right to have it dismissed as to him.⁴ Failure of plaintiff to give bond in replevin is no ground for dismissal. The suit can still be tried upon its merits.⁵ An insufficient bond is no ground of dismissal.⁶ The failure of the officer to select appraisers and appraise the property is no ground for quashing the writ or dismissing the action.⁷ In replevin a disclaimer of any interest in the property, filed by one of the defendants, is no reason for dismissing the suit against him, and his motion for such dismissal is properly refused.⁸

§ 1212. **Right to dismiss lost, if not acted upon in time.** After verdict in an action of replevin, it is too late to move to dismiss the action for insufficiency of the bond.⁹ A motion to dismiss an action of replevin for the insufficiency of the approval of the replevin bond, cannot be made after answer to the merits.¹⁰

¹ *Meredith v. Knott*, 34 Ga. 222.

² *Mansir v. Crosby*, 6 Gray (Mass.), 334.

³ *Gordon v. Bucknell*, 38 Iowa, 438. In this case defendants claimed that plaintiff had used deceit and made false representations, which induced defendant to bring the property into the county where replevied, and asked to quash the writ on that ground, which motion was denied. See also *McLaine v. Hall*, 26 Iowa, 297, and *Knowles v. Pickett*, 46 Iowa, 503.

⁴ *Porter v. Dalhoff & Co.*, 59 Iowa, 459 (13 N. W. 420).

⁵ *McGuire v. Galligan*, 57 Mich. 39 (23 N. W. 479).

⁶ *Baker v. Harper*, 1 J. J. M. 104; *Greenwade v. Fisher*, 5 B. M. 168; *Hicks v. Stull*, 11 B. M. 53.

⁷ *Parlin v. Austin*, 3 Col. 337; *Robinson v. Austin*, 3 Col. 375; *Wyatt v. Freeman*, 4 Col. 14.

⁸ *Smith v. Emerson*, 16 Ind. 355.

⁹ *Rich v. Ryder*, 105 Mass. 306.

¹⁰ *Lathrop v. Bowen*, 121 Mass. 107.

§ 1213. Where proceedings in an action of replevin are stayed by injunction, under a bill in chancery, but the decree in chancery merely settles the rights of the parties to the ownership of the property, and contains no order for its return or adjudication of its value, these matters remain to be disposed of in the replevin suit, and either party may be permitted to go on and introduce evidence on these points.¹

§ 1214. Agreement to arbitrate—When a dismissal. An unconditional submission to arbitrators of the matters in controversy in a replevin suit will operate to discontinue the suit, and thereupon it cannot be said that the merits of the case have been determined in that action, and a surety on the bond will be discharged; but a submission which provides that the award shall have the force and effect of the verdict of a jury, and that judgment may be entered thereon in that action, is distinguishable from one that contains no such stipulation. By such a submission the cause is not withdrawn from court. Such a submission is in the nature of a confession of the judgment afterward rendered.²

§ 1215. Defendant may stipulate for a dismissal. The rule heretofore given is to protect the defendant whose property has been taken, if he choose to waive his right, or if his property has not been taken the rule does not apply. A stipulation for dismissal, without judgment, of a suit in replevin for property taken under a chattel mortgage, leaves the property in the mortgagee's hands, releases the sureties upon the replevin bond, and if the property is beyond reach leaves the mortgagee without adequate remedy.³

§ 1216. Effect of judgment for a return. Judgment of

¹ Dehr v. Lampton, 31 Iowa. 172.

² Perigo v. Grimes, 2 Col. 651. See also Rewe v. Mitchell, 15 Ill. 297; Camp v. Root, 18 Johns. 22; Perkins v. Rudolph, 36 Ill. 306; Archer v. Hale, 4 Bing. 464; *Ex parte* Wright, 6 Cow. 399; Green v. Patchen, 13 Wend. 293; Yates v. Russell, 17 Johns. 461; Hills v. Passage, 21 Wis. 298; Merritt v. Thompson, 27 N. Y. 232; Lamy v. Remuson, 2 N. M. 245.

³ Casper v. Kent Circuit Judge, 45 Mich. 251 (7 N. W. 816).

return on account of a defect is no bar to another action. The return under such order leaves the property and the plaintiff's case where it was when he first commenced.¹

§ 1217. **Effect of judgment of dismissal.** In some states the judgment of dismissal is held to be a final order; in such cases it is appealable or reviewable on error.² If it is not held to be a final order, it would not be reviewable. The dismissal of an action in replevin is a final adjudication against plaintiff, though it might not bar him from bringing another action, and judgment against him for costs and a return of the property should at once be entered by the court.³ The order of a magistrate upon a possessory warrant, dismissing the warrant without stating any reason, is no adjudication of the right of possession, but a dismissal in the nature of a nonsuit.⁴

¹ *Walbridge v. Shaw*, 7 Cush. 560; *Wilbur v. Gilmore*, 21 Pick. 250; *Morton v. Sweetser*, 12 Allen (Mass.), 134.

² *Jewell v. Lamoreaux*, 30 Mich. 155.

³ *Dahler v. Steele*, 1 Mont. 206. See *Leese v. Sherwood*, 21 Cal. 151; *Dawling v. Palack*, 18 Cal. 625.

⁴ *Roseberry v. Roseberry*, 31 Ga. 122.

CHAPTER XXXIX.

CROSS REPLEVIES, SECOND REPLEVIES, AND RECAPTION.

	Section.		Section.
Distinction between the writ of replevin and other writs	1218	And this inhibition extends to grantees of the defendant	1227
Where the property is held by a special writ for that identical property, it can not be replevied	1219	Second replevies—Definition	1228
Judgment in trial of the right of property has the same effect	1220	On the discontinuance of an action in replevin, another one may be brought . . .	1229
The issues made and tried in replevin are <i>res adjudicata</i>	1221	A nonsuit is not now a bar to a new action	1230
The pendency of another action for the same property in same court is a good defense	1222	Recaption—Definition . . .	1231
Former replevin may be pleaded in bar of the second suit	1223	Replevin may be brought against a party in replevin who has just taken it in replevin	1232
Consolidation of the two actions is error	1224	It may be brought against the plaintiff	1233
Cross replevies are not allowed	1225	A stranger to the first action of replevin may bring replevin for the property . .	1234
Illustrations of cross replevies—Definition	1226	Judgment for damages or for other property is not a bar to the second replevin	1235

§ 1218. **Distinction between the writ of replevin and other writs.** In case of a taking of property under an ordinary writ of execution or attachment, the officer is commanded to take the property (any property) of a certain defendant, leaving it discretionary with him what property of that defendant he takes, and placing upon him the duty of deciding what property belongs to defendant. In the exercise of this power the officer is liable to err, and, that as little injury may be done to third parties as possible, it has

been the policy of the law to encourage the speedy settlement of any adverse claims made to property so taken, by allowing the claimant to replevy it or have a trial of the right of property, which is but a modified form of replevin. But where the writ in the hands of the officer commands him to seize specific articles, as it does in replevin, the rule is changed. The action is considered as partly one *in rem*, and the property seized as in the custody of the court, and not subject to a second replevin while so held by the court's officer.¹ See service of writ, Chap. XXIV. This was the rule at common law and is the general rule under the codes.

§ 1219. **Where the property is held by a special writ for that identical property, it cannot be replevied.** It is then regarded as in court, the same as if replevied, and its status will be settled in that special proceeding. Thus, where the identical property is taken under a command of a writ for that property, as for an attachment to enforce a laborer's lien for cutting logs, the same property cannot be replevied from the officer holding it by attachment to enforce the lien.² But judgment for the plaintiff (a lienor) in such action does not estop the general owner of the logs from denying the plaintiff's right to a lien, in replevin by such owner against the purchaser under the judgment foreclosing said lien.³ But the status of the logs is settled by the judgment and sale under the lien.⁴

¹ Sanborn v. Leavitt, 43 N. H. 473; Bell v. Bartlett, 7 N. H. 188; Maloney v. Griffin, 15 Ind. 214; Shipman v. Clark, 4 Denio. 446; Lowry v. Hall, 2 W. & S. (Pa.) 131; Williard v. Kimball, 10 Allen, 211; Foster v. Pettibone, 20 Barb. 350; Ilsley v. Stubbs, 5 Mass. 280; Stimpson v. Reynolds, 14 Barb. 506; Morris v. De Witt, 5 Wend. 71; Spring v. Bourland, 6 Eng. (Ark.) 658; Rhines v. Phelps, 3 Gilm. (Ill.) 455; Watkins v. Page, 2 Wis. 92.

² The Union Lumber Company v. Tronson, 36 Wis. 126; Griffith v. Smith, 22 Wis. 646; Battis v. Hamlin, Id. 669. The statute of Wisconsin gives to any person "that shall furnish any supplies, or that may do or "perform any labor or services in cutting, felling, hauling, driving, running, rafting, booming, cribbing, or towing any logs or timber," a lien on them "for the amount due for such supplies, labor, or services."

³ Winslow v. Urquhart, 39 Wis. 261.

⁴ Winslow v. Urquhart, 44 Wis. 197.

§ 1220. **Judgment in trial of the right of property has the same effect.** Where a statute provides that where property is attached, and is claimed by one other than the attachment defendant, he may have a trial of the right of property, and if he elect to do this instead of bringing replevin, and on the trial of the right of property the finding is against him, he cannot then bring replevin.¹

§ 1221. **The issues made and tried in one replevin suit are res adjudicata,** and cannot be retried in another. The errors in the first replevin suit must be corrected by the reviewing court.² A defendant in execution, after judgment in replevin, cannot sue out another writ in replevin.³ C. replevied property from W. On the trial it was awarded to W. and writ of restitution issued, but C. appealed; whereupon W. brought replevin against B. and C., claiming the appeal irregular. *Held*, that he could not maintain the action, and that C. was entitled to the possession as against W. during the pendency of that suit.⁴ But judgment in replevin does not prevent the defeated party from bringing replevin under a change of circumstances.⁵

§ 1222. **The pendency of an action of replevin for the same property, between the same parties, in the same court, is a good defense** against the prosecution of a second action in replevin. The fact that defendant has retained the property by giving a delivery bond does not affect the title, and defendant's possession under the redelivery bond cannot be disturbed by plaintiff.⁶

§ 1223. **Former replevin may be pleaded in bar of the second suit.** The only question that can arise in such cases is one of identity. The identity of the property is a ques-

¹ *Bray v. Saaman*, 13 Neb. 518 (14 N. W. 474); *Storms v. Eaton*, 5 Neb. 453; *Abbey v. Searls*, 4 O. St. 598.

² *Mayhue v. Snell*, 37 Mich. 305.

³ *Tyson v. Bowden*, 8 Fla. 61.

⁴ *Clark v. West*, 23 Mich. 242. See also *Belden v. Laing*, 8 Mich. 500.

⁵ *Deyoe v. Jamison*, 33 Mich. 94.

⁶ *Turner v. Reese*, 22 Kan. 319.

tion of fact and should be submitted to the jury.¹ The defendant in cross-replevin may plead in abatement the original replevin, and if his plea is sustained he may have judgment for a return.² The party against whom a former adjudication in replevin is set up as a bar may reply that it did not relate to the same property or transaction as that in controversy in the pending suit, and may give parol evidence upon the question of fact thus raised.³ The defense of a former judgment must be set up specifically in the answer, or it will not be considered. Failure to plead an estoppel of this character is a waiver of it.⁴ The pendency of another suit between the parties, founded on the same cause of action, is not good matter for a plea in abatement, when the former suit or proceeding is void on its face.⁵

§ 1224. **Consolidation of two actions.** It is error for the court to consolidate two actions of replevin where, although the parties are the same, the things in controversy are different, and the sureties on the two bonds are different.⁶

§ 1225. **Cross-replevins are not allowed,** for the reason that there is nothing to be gained thereby. The first replevin brings the parties to that action and the property before the court, where either is entitled to be heard and to set up all matters pertaining to the property. The law will not allow one from whom the property has just been taken to retake it; he must assert his claim in the action in which he is defendant.⁷ The wrongful detainer of a chattel who has had judgment for its value against the owner, in re-

¹ *Merriam v. Lynch*, 53 Wis. 82 (10 N. W. 1).

² *Beers v. Wuerpul*, 24 Ark. 272.

³ *Pfennig v. Griffith*, 29 Wis. 618.

⁴ *Harrison v. Hoff*, 102 N. C. 126 (8 S. E. 887). See *Yates v. Yates*, 81 N. C. 397; *Truttell v. Harrill*, 85 N. C. 456; *Gay v. Stancell*, 76 N. C. 369.

⁵ *Ernst Bros. v. Hogue*, 86 Ala. 502 (5 So. 738).

⁶ *Spratley v. Kitchens*, 55 Miss. 578.

⁷ *Watkins v. Page*, 2 Wis. 92; *Dearmon v. Blackburn*, 1 Sneed. (Tenn.) 390; *Hunt v. Mootry*, 10 How. Pr. (N. Y.) 478; *Belden v. Laing*, 8 Mich. 500.

plevin, cannot himself recover in replevin after judgment in trover against himself for its value.¹ A defendant will not be allowed to thus forestall the action of the court, or to change the forum in this manner.²

§ 1226. **Illustrations of cross-replevins—Definition.** A cross-replevin is where the defendant in one replevin becomes plaintiff in another for the same property, or where the issues are the same. Thus, B. brought suit in replevin against F., who was a member of a firm, and N., who was its agent and in possession of the property replevied. The firm then brought replevin against B., and joined three other defendants with him, for the same property delivered to B. upon the first writ, and the only question in both suits was whether B. or the firm was the owner of the property *Held*, that the second suit was a cross-replevin, and could not be maintained. That the parties in the second suit are not identical with those in the first suit is not important, unless the new parties claim some interest in the property or right thereto, different from or independent of the parties to the first suit.³ In Connecticut cross-replevins seem to have been allowed without question.⁴ W. replevied property from B. and delivered it into the possession of the defendant as bailee. B. and M., as partners under the style of B. & Co., brought a second suit in replevin against the defendant for the same property. *Held*, that it was a cross-replevin and could not be sustained.⁵ Where defendant in replevin asked a nonsuit against plaintiff, which was granted without judgment for a return, he cannot have an independent action in

¹ Hoag v. Breman, 2 Mich. 160.

² Hagan v. Deuell, 24 Ark. 216; Maloney v. Griffin, 15 Ind. 213; Pawell v. Bradlee, 9 Gill. & J. 220; Shaw v. Levy, 17 S. & R. 103; Morris v. De Witt, 5 Wend. 71; Belden v. Laing, 8 Mich. 503; Clark v. West, 23 Mich. 243.

³ Fisher v. Busch, 64 Mich. 180 (31 N. W. 39); Beers v. Wuerpul, 24 Ark. 273.

⁴ Trowbridge v. Bosworth, 45 Conn. 166; Bosworth v. Trowbridge, 45 Conn. 161.

⁵ Beers v. Wuerpul, 24 Ark. 272.

replevin against the sheriff, but must pursue his remedy in the first action.¹ It is nowhere claimed, in these cases or in any other, that the defendant in replevin could at once turn around and replevy the goods from the plaintiff in another action of replevin. An insuperable objection to plaintiff's right to maintain this action is the pendency of another action between the same parties involving the same issue.² The plaintiff commenced the action of claim and delivery against John Rahilly, and the wheat in controversy therein was taken from J. R.'s possession and delivered to plaintiff. Subsequently Patrick Rahilly was made a party defendant, and he answered and took part in the trial without objection. After the action was commenced against J. R., and before P. R. was made a party, P. R. had brought replevin against this plaintiff and two other defendants, and the property had been delivered to P. R. *Held*, that the action brought by P. R., though pending and undetermined, was no bar to this action, and that this action is to be taken as having been commenced against P. R., as of the time when he became a party defendant therein, and judgment was properly rendered, on a finding in plaintiff's favor, against Patrick Rahilly, for the possession of the wheat or its value.³

§ 1227. **And this inhibition extends to grantees of the defendant**, who cannot maintain replevin if they acquired their title after the first suit was brought. The rights of all parties could be determined in the first action,⁴ and they must be asserted there or be forever barred.

§ 1228. **Second replevins** are those where a plaintiff in replevin brings a second action to accomplish the same thing he attempted to do in the first action of replevin. If the first case be tried on its merits, it is a bar, but if it fail for any reason, short of final judgment, another action may be

¹ *Fleming v. Wells*, 65 Cal. 336 (4 P. 197).

² *Bonney v. Smith*, 59 N. H. 411.

³ *Chadbourn v. Rahilly*, 34 Minn. 346 (25 N. W. 633).

⁴ *Hines v. Allen*, 55 Me. 115. See *Rich v. Savage*, 12 Neb. 413 (11 N. W. 863).

brought. Where property had been first replevied, and there was evidence to show that the plaintiffs in that suit had waived the delivery of possession to them under the writ, and it was then taken under a subsequent writ of replevin, the first was not a bar though the property was in possession of the sheriff at the issuance of the second writ.¹ The rightful owner may replevy property from a *bona fide* purchaser of one who replevied it from the rightful owner, whose suit abated by his death before judgment.² If the plaintiff be nonsuited before trial on the merits, he may bring another action, and the first is no bar.³ A second writ of replevin cannot be superseded or quashed on the ground that it is a cross-replevin, but it may be proved in bar of the first suit, or pleaded in abatement.⁴

§ 1229. **On the discontinuance of an action in replevin another one may be brought.** Although it be between the same parties and for the same property, its discontinuance leaves the parties as they were before any action was brought and the property subject to replevin.⁵ But this is always with the understanding that where the possession of the property has been interfered with it must be restored to its former possession before the new action is brought; thus, where a plaintiff in replevin, on the dismissal of his first action, returned the property to the agent of the defendant, and brought another replevin, it was *held* that the second action would not lie, unless defendant had accepted such a return, or in some way ratified it.⁶ B. replevied property from D., and by deception kept D. away from court, and dismissed the suit and paid the costs. D., on the discovery of the trick, replevied the property in the superior court. *Held*, that D.'s

¹ Powell v. Bradlee, 9 Gill. & J. (Md.) 220.

² Lockwood v. Perry, 9 Metc. (Mass.) 440.

³ Daggett v. Robbins, 2 Blackf. (Ind.) 415; Westcott v. Bock, 2 Col. 335.

⁴ Fisher v. Marquette, 58 Mich. 450 (25 N. W. 460).

⁵ Hackett v. Bonnell, 16 Wis. 471.

⁶ Way v. Barnard, 36 Vt. 366.

remedy on the replevin bond was not exclusive, and that he could maintain the action.¹

§ 1230. **A nonsuit is not now a bar to a new action.** According to the old common law rule, nonsuit in one replevin was a complete bar to another replevin.² This was founded upon the statute of Edw. I., which provided that if the party replevying made default the distress should remain irrepleviable forever; but that rule is inconsistent with the laws, practice, and policy of this country.³ A judgment of nonsuit in an action of replevin is not a bar to another action for the same goods.⁴

§ 1231. **Recaption.** Where the holding of an officer under a writ is interfered with illegally, he may usually retake the property when and where he can find it, or when a legal bar to his possession is raised, he may retake it on the removal of this bar. This second taking is called recaption. Such cases frequently arise in attachment cases, but are of rare occurrence in replevin, but the same rule would apply.⁵

§ 1232. **Replevin may be brought against a party in replevin** who has just taken the property in a suit against a third party.⁶ Where the property has been delivered to the plaintiff, it may be again replevied at the suit of another claimant.⁷ While the property replevied remains in the custody of the officer, for the purpose of enabling him to deliver it according to the exigencies of the writ, it cannot be taken from him by a second writ of replevin at the suit of a stranger; but as soon as he has perfected service of the process, the property may be replevied from the person to whom the officer has delivered it. While it remains in the

¹ Bruner v. Dyball, 42 Ill. 34.

² Wheaton's Selwyn, Vol. 2, 1226.

³ Daggett v. Robbins, 2 Blackf. 415.

⁴ Westcott v. Bock, 2 Col. 335.

⁵ Kayser v. Bauer, 5 Kan. 202.

⁶ Kelleher v. Clark, 135 Mass. 45; White v. Dolliver, 113 Mass. 400; Bussing v. Rice, 2 Cush. 48; Blanchard v. Child, 7 Gray, 155.

⁷ Bell v. Bartlett, 7 N. H. 178, 190; Ilsley v. Stubbs, 5 Mass. 280.

sheriff's custody, it is in the power of the court to make such order touching it as will enable a third person, who may claim it, to effect service of his writ upon it.¹

§ 1233. **It may be brought against the plaintiff.** One whose property has been replevied by a writ against his agent or his bailee, can retake it by replevin from the plaintiff in the first action, even during the pendency of that action. One who is a stranger to a replevin suit and claims the property may bring replevin against anyone, except the officer serving the writ; while the property is in his possession it is *custodia legis*, and is not repleviable.² Where personal property is in the hands of the plaintiff in an action of claim and delivery, a third person who claims it is not obliged to intervene, but may institute another action of claim and delivery for the property.³

§ 1234. **A stranger to the first action of replevin may bring replevin for the property.** An action of replevin can be maintained against an officer for the recovery of the possession of personal property, that he holds by virtue of an order of delivery, previously issued in another replevin action, provided the person who commences the second action is not a party to the first.⁴ The owner of personal property, held by an officer under a writ of replevin in another case, to which such owner was not a party, may maintain cross-re-

¹ *Weiner v. Van Rensselaer*, 43 N. J. 547; *Watkins v. Page*, 2 Wis. 69; *Hagan v. Deuell*, 24 Ark. 216; *Powell v. Bradley*, 9 Gill. & J. 220; *Willard v. Kimball*, 10 Allen, 211; *Sanborn v. Leavitt*, 43 N. H. 473; *Hallett v. Byrt*, Carth. 380; *Foster v. Pettibone*, 20 Barb. 350.

² *White v. Dolliver*, 113 Mass. 400; *Isley v. Stubbs*, 5 Mass. 280; *Bell v. Bartlett*, 7 N. H. 178; *Sanborn v. Leavitt*, 43 N. H. 473; *Globe Works v. Wright*, 106 Mass. 207; *Willard v. Kimball*, 10 Allen, 211; *Hallett v. Byrt*, Carth. 380.

³ *Buckley v. Buckley*, 9 Nev. 373.

⁴ *Reiley v. Haynes*, 38 Kan. 259 (16 P. 440). In this case *Reiley & Hunter* brought a replevin against *James H. Haynes* and *Schaaf*, claiming by virtue of a chattel mortgage given by the defendants. Before the determination of this action, *Martha J. Haynes*, wife of *J. H. H.*, brought replevin against *Reiley*, the sheriff claiming as owner. The court says the action can be maintained, and follow *Gross v. Bogard*, 18 Kan. 288.

plevin against the officer for its possession. The remedy by intervention in the first suit is not exclusive.¹

§ 1235. **Judgment for damages or for other property is not a bar to the second replevin.** Where plaintiff brought replevin for two animals, and on only getting one of them suffered judgment to go against him by default, and then brought replevin for the other animal, *held*, that it was no bar and replevin would lie.² A brought an action of replevin against B, but failing to get possession of the property, he elected to proceed as for damages (case), and recovered a judgment, on which execution issued, and was returned *nulla bona*. Afterwards, finding the property in the hands of C, he replevied it from him. *Held*, the right of property did not vest in B, upon the rendition of the judgment for its value against him, and such unsatisfied judgment is no bar to the suit against C. And this would be true whether B and C were joint trespassers, or C was a purchaser from B, with or without notice. Although the judgment in the first case represented the price of the property, the liability of the defendant, or those that claim through him, must remain in morals and in law, until he discharges his obligation by paying that judgment.³

¹ *Davis v. Gambert*, 57 Iowa, 239 (10 N. W. 658). The statute provides that in replevin, the petition must show that the property "was neither taken on the order, or judgment of a court against" the plaintiff, "nor under an execution or judgment against him or against the property." But if taken by either of these modes, facts exempting it must be shown. Code, § 3225, Part 4. An officer seizing property is protected until after notice served on him in writing. Code, § 3055. No other restrictions are imposed by statute. Any claimant of property replevied may intervene. Code, § 3228.

² *Poor v. Darrah*, 5 Houst. 394.

³ *Turner v. Brock*, 6 Heis. (Tenn.) 50; *Knott v. Cunningham*, 2 Sneed. (Tenn.) 204; *Lovejoy v. Murray*, 3 Wal. 1.

CHAPTER XL.

ERROR AND APPEAL.

	Section.		Section.
General principles . . .	1236	rect assessment of dam-	
Proceedings in error or ap-		ages by the jury . . .	1243
peal must be by the real		What defects are waived by	
party in interest . . .	1237	appeal—Practice on appeal	1244
Joint parties should join in		Defense cannot be changed	
proceedings to vacate or		upon appeal . . .	1245
modify the judgment . .	1238	How appealable value deter-	
Pleadings may be amended		mined	1246
even after judgment . .	1239	After appeal taken the judg-	
Practice in error cases in		ment is held in abeyance .	1247
replevin—Illustrations .	1240	When return will be awarded	
The same—Waiver of right		in appellate court . . .	1248
to error	1241	Appeal does not open a judg-	
Error from judgment of dis-		ment in appellant's favor	
missal	1242	for part of the property .	1249
Presumption in favor of cor-			

§ 1236. **General principles.** Judgment in replevin is subject to the same rules, as to appeal and review on writs of error, as other actions. On appeal the case is to be tried over again *de novo*, but on the same issues. On error the same presumptions exist in favor of the judgment of the trial court. As the questions in replevin are usually peculiarly jury questions, courts should be very slow to reverse a case for unimportant errors where the main issue was fairly and plainly submitted to the jury and has been passed upon; and the general rule is that such finding of fact will not be disturbed if there is sufficient evidence to support such a finding. Where the practice in appeal or error is a matter of special statute, that, of course, must govern rather than the general law in such cases. The appellate court will always presume, in the absence of a showing to the contrary, that

the judgment rendered by the trial court was the proper one to be rendered in the case.¹ A judgment in replevin obtained by fraud will be canceled by a court of equity.²

§ 1237. **Proceedings in error or appeal must be by the real party in interest** and a party to the suit of record, and cannot be by a stranger. A surety in a replevin bond can not, in his own name, prosecute an appeal to retry issues made and determined between his principal and a defendant, against whom his principal had commenced but failed to prosecute the replevin. But the rule would be otherwise as to a question presented by him, raising a defense growing out of his suretyship merely.³

§ 1238. **Joint parties should join in proceedings to vacate or modify the judgment.** When two or more parties are joined in a replevin suit they may join in prosecuting error, and should not prosecute separate appeals even if some of the exceptions taken apply to one and not to the other.⁴

§ 1239. **Pleadings may be amended even after judgment,** as well as before judgment, in the interest of justice, the same as in other cases.⁵

§ 1240. **Practice in error cases in replevin.—Illustrations.** Defect of parties plaintiff in replevin must be raised in the trial court; it cannot be first raised in the reviewing court on error.⁶ In passing upon the sufficiency of the evidence to support a verdict in replevin, the courts are governed by the same rules as in other cases.⁷ Error cannot be assigned upon a ruling of the district court made with the consent of the complaining party.⁸ On reversing a judgment in replevin for the plaintiff, the value of the property not

¹ *Vinyard v. Barnes*, 124 Ill. 346 (16 N. E. 254).

² *Maxwell v. Hannon*, 29 N. J. Eq. 525.

³ *Crites v. Littleton*, 23 Iowa, 205.

⁴ *Auld v. Kimberlin*, 7 Kan. 601.

⁵ *Hale v. Wigton*, 20 Neb. 83 (29 N. W. 177).

⁶ *Seip v. Tilghman*, 23 Kan. 289.

⁷ *Rozell v. Denver L. W. Co.*, 26 Kan. 548.

⁸ *Chamberlain v. Brown*, 25 Neb. 434 (41 N. W. 284).

having been determined on the trial, and not being ascertainable from the record, it will be remanded for a new trial.¹ Where the verdict and judgment are clearly right upon the evidence, errors in instructing the jury, or in other respects, which could not have changed the result, must be disregarded.² In replevin a reviewing court cannot permit the judgment to stand as to part of the property and reverse it as to the rest, where the verdict was a general one for the plaintiff; but if the trial court was wrong in its instructions as to part of the property, it will reverse the whole case.³ An erroneous verdict upon which no judgment is rendered is not reversible error.⁴ After a judgment by default, upon due notice, a clear case of error must be made out to entitle the defendant to a reversal.⁵ The court has no jurisdiction to render judgment in a replevin suit when no service of process has been made on the defendant, and if judgment is so rendered, it will be reversed by writ of error.⁶ A judgment of the county judge upon possessory warrant, though not rendered in term time, may be reviewed by the supreme court.⁷

§ 1241. **The same—Waiver of right to error.** A defendant in replevin pleaded *non cepit*, and also avowed and justified. Issues were made on both pleas and a verdict was given for defendant, with judgment for restitution. *Held*, that as he was clearly not entitled to judgment on the *non cepit*, and as there was nothing in the record to show that the trial was confined to the other issue, or that the verdict was found on that alone, judgment must be reversed.⁸ Where plaintiff had offered to return the property on judgment

¹ Winslow v. Urquhart, 39 Wis. 261.

² Appleton v. Barrett, 29 Wis. 221.

³ Hallowell v. Milne, 16 Kan. 65.

⁴ Battis v. McCord, 70 Iowa, 46 (30 N. W. 11).

⁵ Robinson v. White, 15 Miss. (7 S. & M.) 39.

⁶ Abrams v. Jones, 4 Wis. 806.

⁷ Carter v. Commander, 35 Ga. 265.

⁸ Gains v. Tibbs, 6 Dana (Ky.), 143.

against him by a writing filed in court, and this offer was accepted conditionally, and this offer and conditional acceptance were set up as a bar to proceeding in error in the supreme court instituted by plaintiff, *held*, that as the conditions of the acceptance were not agreed to, it did not constitute a waiver of errors.¹ Where the complaint in replevin consists of several paragraphs, and no demurrer is filed, but issue joined on each, and error intervenes under some of the paragraphs and not under others, if the judgment is capable of separation it should be affirmed as to part and reversed as to part; and that a claim for a money judgment is joined with one of the paragraphs of the complaint is not alone ground for reversal on account of the misjoinder.²

§ 1242. **Error from judgment of dismissal.** Writ of error is the proper remedy to review the decision of a circuit judge, dismissing a writ of replevin and quashing all proceedings with costs. Such an order is a final determination of the suit.³ An order vacating or setting aside an order of delivery (or writ) in replevin is reviewable in Kansas without waiting for the final determination of the suit in which it was issued.⁴ Such an order is reviewable in Ohio.⁵ But in some states a contrary rule is followed, as in Florida, where the courts say the action of replevin is an extraordinary remedy; a judgment dismissing the suit is not final, and error cannot be assigned upon it.⁶

§ 1243. **Presumption in favor of correct assessment of damages by the jury.** Unless it is impossible that the damages recovered by a plaintiff in an action of replevin could have been assessed under any competent evidence, it will be presumed that the evidence justified the judgment

¹ Williams v. Eikenberry, 22 Neb. 211 (34 N. W. 373).

² Keller v. Boatman, 49 Ind. 104.

³ Jewell v. Lamoreaux, 30 Mich. 155.

⁴ Kennedy v. Beck, 15 Kan. 555.

⁵ Reed v. Carpenter, 2 Ohio, 79.

⁶ Branch v. Branch, 5 Fla. 447. See Maids v. Watson, 13 Mo. 544.

rendered, in the absence of a bill of exceptions.¹ When a verdict in replevin is so clearly against the weight of evidence as to lead to the conviction that it was the result of passion, prejudice, or inadvertence on the part of the jury, it will be set aside and a new trial awarded by the reviewing court, the same as in other cases,² though replevin is peculiarly a question for the jury. The supreme court will not set aside a verdict for defendant in replevin on the ground of excessive damages, when the evidence of the value of the property retained by plaintiff is conflicting.³ Error in admitting evidence of special damages is no ground for the reversal of a judgment which does not include any special damages.⁴ On appeal in replevin where the damages are excessive the court will, on a *remittitur* of the excessive damages, affirm the case.⁵

§ 1244. **What defects are waived by appeal—Practice on appeal.** An appeal in replevin is a waiver of defects in the petition and affidavit and an acknowledgment of the jurisdiction of the court from which the appeal was taken.⁶ On appeal, defects in the affidavit in replevin before the justice will not be considered.⁷ It is too late, on error or appeal to the supreme court, to raise the question that the petition did not aver an unlawful taking, or the proof show demand.⁸ A judgment on the merits will not be reversed on error or appeal because of some technical defect in the bond.⁹

¹ *Brennan v. Shinkle*, 89 Ill. 604.

² *Holland v. Griffith*, 13 Neb. 472 (14 N. W. 387); *Gandy v. Pool*, 14 Neb. 98 (15 N. W. 223); *Laughlin v. Kavanaugh*, 15 Neb. 39 (16 N. W. 753).

³ *Bostick v. Brittain*, 25 Ark. 482.

⁴ *Coleman v. Reel*, 75 Iowa, 304 (39 N. W. 510).

⁵ *Bigelow v. Doolittle*, 36 Wis. 116.

⁶ *Dickson v. Randall*, 19 Kan. 212; *Miller v. Bogart*, 19 Kan. 117.

⁷ *Goodell v. Ward*, 17 Minn. 1. The objections to the affidavit were not raised in justice or district court, and plaintiff was successful in both courts.

⁸ *Kruger v. Pierce*, 37 Wis. 269.

⁹ *Chandler v. Smith*, 14 Mass. 315.

Exceptions in the court below to the sufficiency of a replevin bond are waived by pleading in the court above.¹ Objections to the service cannot be made for the first time in the appellate court.² Where the bond was found to be inapplicable to the return, which was correct, the court refused to reverse the final judgment, though the return should have been quashed.³ Where the parties to a replevin suit, without objection or remonstrance, go to trial upon the merits, the supreme court will not reverse, though the pleadings made no issue for the jury.⁴ In an action of replevin, where there was judgment for defendant, *held*, that the judgment could not be assailed in this court on the ground that the defendant did not, in terms, allege that he was the owner of the property, when no objection on that ground was raised to the answer in the trial court, and it was very plain from all the pleadings that defendant claimed to own the property.⁵ If the attention of the trial court is not called to its neglect to enter an alternative judgment, it cannot be taken advantage of on appeal.⁶ Where the verdict is right an erroneous judgment will be corrected by the supreme court on appeal.⁷ If a replevin action be commenced before a justice who does not have jurisdiction, the proceeding is void, and will be dismissed by the appellate court.⁸ Where a verdict in a replevin suit in the words, "We, the jury, find the right of the property in the plaintiff, except \$100, which was not covered by the mortgage," was changed in its form by the court, and judgment rendered for a return of the \$100 by the plaintiff to defendant, *held*, that judgment should be reversed upon appeal.⁹

¹ Carnick v. Wilson, 34 Me. 593.

² Davenport v. Burke, 9 Allen (Mass.), 116.

³ Hicks v. Stull, 11 B. Mon. (Ky.) 53.

⁴ Mathias v. Sellers, 86 Pa. 486.

⁵ McIntye v. Eastman, 76 Iowa, 455 (41 N. W. 162).

⁶ Woodbury v. Tuttle, 26 Ill. App. 211.

⁷ Robinson v. Richards, 45 Ala. 354.

⁸ Richardson v. Davis, 59 Miss. 15.

⁹ Moore v. Devol, 14 Iowa, 112.

§ 1245. **Defense cannot be changed upon appeal.** On appeal a defendant in replevin cannot change his defense and defend as a bailee when in the first court his defense was a denial.¹ Most states provide by statute that a party who appeals a case must try it upon the same issues as in the lower court. This provision is in the interests of justice, as it would be manifestly unfair to allow a party to try one line of attack or defense, and when defeated appeal to another court and there try an altogether different line. And replevin actions are governed by this rule.

§ 1246. **How appealable value determined.** The sum of the value of the property replevied and the damage constitute the amount in controversy, within the meaning of the law limiting the right to appeal to a certain amount.²

§ 1247. **After appeal taken, the judgment is held in abeyance.** An appeal in replevin stops all efforts to enforce the judgment until final determination of the appeal, as in any other form of action.³ The bond given in appeal supersedes the judgment for the time being, and is an additional security to the successful party, if his good luck does not forsake him before the final decision is reached.

§ 1248. **When return will be awarded in appellate court.** In replevin, where the property has been delivered to plaintiff, if upon appeal upon questions of law alone the district court reverses the judgment generally, without deciding the merits of the action, the defendant is entitled, as upon a dismissal, to judgment for a return of the property, or its value, if a return cannot be had, and the parties are left as they were to proceed *de novo* as regards the property.⁴

§ 1249. **Appeal does not open a judgment in appellant's favor** for part of the property; each judgment in such

¹ Tell v. Beyer, 38 N. Y. 161.

² Andrews v. Baker, 59 Vt. 656 (10 A. 465); Fisk v. Wallace, 51 Vt. 418.

³ Corn Exch. Bank v. Blyé, 102 N. Y. 305 (7 N. E. 49).

⁴ Terryll v. Bailey, 27 Minn. 304 (7 N. W. 261).

a case is an entirety and stands or falls the same as a judgment in another action. When replevin is brought for a number of chattels, some of which belong to the plaintiff, and others to the defendant, although all are declared for in one count, the case is dealt with as if it were two counts, and each party was entitled to prevail upon one. Each party is an actor and may have judgment and legal costs, and an appeal by one party does not re-open or affect the judgment in his favor.¹

¹ Vinal v. Spofford, 139 Mass. 126; Seymour v. Billings, 12 Wend. 285; Williams v. Beede, 15 N. H. 483; Powell v. Hinsdale. 5 Mass. 343. See Newell Co. v. Muxlow, 51 Hun. (N. Y.) 453.



PART THIRD.

**QUESTIONS ARISING IN THE PROSECUTION AND
DEFENSE OF AN ACTION ON THE
REPLEVIN BOND.**



CHAPTER XLI.

WHAT CONSTITUTES A BREACH, AND WHEN RIGHT OF ACTION
ACCRES ON THE BOND.

	Section.		Section.
What constitutes a breach	1250	Failure by death, or other	
The condition to prosecute		act of God	1261
without delay	1251	The obligors may limit their	
What is an unusual delay	1252	liability to the successful	
The condition to prosecute		trial in justice court	1262
with effect	1253	But ordinarily, the obliga-	
The same	1254	tion refers to the final de-	
Dismissal on ground of no		termination	1263
jurisdiction is a breach	1255	The replevin action must be	
Voluntary nonsuit is a		finally ended, or suit on	
breach of this obligation	1256	bond will be enjoined	1264
Failure to enter the suit in		Breach of the condition to	
court is a breach	1257	return	1265
A contrary rule held where		Demand for return not nec-	
the "court" was absent	1258	essary	1266
Where the suit abates by re-		The judgment of return in	
moval of the court, bond		replevin is conclusive on	
not liable	1259	the sureties	1267
Failure in the suit is a breach		The failure to pay a money	
of this condition	1260	judgment or costs, is a	
		breach	1268

§ 1250. **What constitutes a breach.** The several conditions of the replevin bond are distinct and several, and upon a breach of any one of them an action lies, though none of the others be broken, and the recovery may be the full amount of the penalty, the same as if all had been broken. And this is the case if the bond is void as to some of its obligations; if the one for the breach of which the suit is brought is good, it matters not that some other one is not good.¹ The several conditions required to be inserted in a

¹ Fisse v. Katzintine, 93 Ind. 490.

replevin bond are to be treated as separate and independent. The object and purpose of a replevin bond is to indemnify the officer who executes the replevin writ, and to indemnify the defendant, or person from whose custody the property is taken, for such damages as he may sustain.¹ And generally a right of action accrues immediately on the breach. Any other rule is statutory.

§ 1251. **The condition to prosecute without delay** is not broken by those delays always incident to the conduct of legal business in this country. But by assuming this obligation the bondsmen agree that the plaintiff shall be ready to prove his claim at any time the court can hear him, or when the cause is reached for trial in its regular order, and that he will not upon frivolous pretexts postpone a final hearing. He is entitled to the usual and necessary delays granted by the court to procure witnesses, etc. The conditions to prosecute the suit to effect and to make return of the property are distinct, and the condition is broken and the bond forfeited by a failure in either.² Evidence of breach of the former condition cannot, therefore, be held sufficient proof of a breach of the latter condition.³ The sureties in a replevin bond are not discharged by delay in prosecuting the replevin suit where it does not appear to have been unreasonable and improper.⁴

§ 1252. **What is an unusual delay** is a matter to be determined in each particular case under the facts of that case. Thus, a failure to prosecute for two years without good cause

¹ *Imel v. Van Derin*, 8 Col. 90 (5 P. 803); *Humphrey v. Taggart*, 38 Ill. 228; 2 *Sutherland on Damages*, p. 42.

² *Vinyard v. Barnes*, 124 Ill. 346 (16 N. E. 254); *Perreau v. Bevans*, 5 Barn. & Cress. 284; *Brown v. Parker*, 5 Blackf. 291.

³ *Vinyard v. Barnes*, 124 Ill. 346 (16 N. E. 254); *Thomas v. Irwin*, 90 Ind. 557; *Way v. Barnard*, 36 Vt. 370; *Collamer v. Page*, 35 Vt. 392; *Clark v. Norton*, 6 Minn. 419; *Pettygrove v. Hoyt*, 2 Fair (11 Me.), 66; *Badlaw v. Tucker*, 1 Pick. 284; *Kimmel v. Kent*, 2 Watts, 432; *Ladd v. Prentice*, 14 Conn. 116; *Cooper v. Brown*, 7 Dana (Ky.), 333; *Clary v. Roland*, 24 Cal. 148; *Gallarati v. Orser*, 24 N. Y. 324.

⁴ *Brown v. Fulkerson*, 8 B. Mon. (Ky.) 393.

shown was regarded as a forfeiture of this condition, though no judgment of *nol. pros.* was entered.¹

§ 1253. **The condition to prosecute with effect** means that the plaintiff will prosecute his suit to a final conclusion successfully, and if for any cause he fail in the final result, or if he suffer a nonsuit or dismissal, the condition is broken, and an action will lie for the full penalty of the bond.² It is not necessary that judgment for a return be entered; the failure to prosecute is the breach.³ Even where defendant consented to the dismissal, it is still an actionable breach,⁴ unless he consent to waive his right to damages.⁵ Where defendant pleaded *non cepit*, and the plaintiff afterward was nonsuited, there was no failure to prosecute with success.⁶ But as long as the suit is pending, no matter how much delayed, there is no breach of this condition.⁷ The condition in a replevin bond, that the plaintiff will prosecute his suit to effect and without delay, is a substantive and independent condition, and as material as any other in the bond,⁸ and may be declared upon for a breach the same as any other substantive condition.

§ 1254. **The same.** The condition of a replevin bond, that the plaintiff shall prosecute the action with effect, means that he shall prosecute with success or to a successful de-

¹ *Axford v. Perrett*, 4 Bing. 586.

² *McFarland v. McNitt*, 10 Wend. 330; *Persse v. Watrous*, 30 Conn. 144; *Gould v. Warner*, 3 Wend. 54; *Humphrey v. Taggart*, 38 Ill. 228; *Langdoc v. Parkinson*, 2 Bradw. (Ill.) 136; *Balsley v. Hoffman*, 13 Pa. St. 603; *Doogan v. Tyson*, 6 Gill. & J. (Md.) 453; *Hansard v. Reed*, 29 Mo. 473; *Berghoff v. Heckwolf*, 26 Mo. 511.

³ *Gibbs v. Bartlett*, 2 W. & S. (Pa.) 29; *Sopris v. Lilley*, 2 Col. 498; *Elliott v. Black*, 45 Mo. 373; *Brown v. Parker*, 5 Blackf. (Ind.) 292; *Dias v. Freeman*, 5 Term. R. 195 and 104.

⁴ *Stevison v. Earnest*, 80 Ill. 513.

⁵ *Hall v. Smith*, 10 Iowa, 46; *Berghoff v. Hickwolf*, 26 Mo. 511.

⁶ *Cooper v. Brown*, 7 Dana (Ky.), 333; *Ladd v. Prentice*, 14 Conn. 116; *Persse v. Watrous*, 30 Conn. 147.

⁷ *Brackenbury v. Pell*, 12 East. 586; *Harrison v. Wardle*, 5 B. & A. 146.

⁸ *Humphrey v. Taggart*, 38 Ill. 228.

termination, and is broken if the action is dismissed.¹ It is not necessary to the maintaining of an action for this breach of the bond that there should have been a judgment in the replevin action for a return of the property or for damages. This condition is distinct and independent of the other conditions of the bond, and for its breach an action will lie.²

§ 1255. **Dismissal on ground of no jurisdiction is a breach.** The condition of a replevin bond was that the plaintiff in replevin should prosecute the writ to final judgment, pay such damages and costs as the defendant might recover against him, and restore the same goods and chattels in like good order and condition as when taken, in case such should be the final judgment on the writ. The replevin writ, upon its face good, was dismissed on appeal for want of jurisdiction in the court below from which it issued. *Held*, that there had been a breach of the conditions of the bond. *Held*, further, that to satisfy the conditions of the bond, the plaintiff in replevin must prosecute the writ to a final judgment on the merits of the case, affirming his own right of possession, or ordering a return and restoration to the defendant.³

§ 1256. **Voluntary nonsuit is a breach of this obligation.** Bond conditioned, first, to prosecute the suit with

¹ *Boom v. St. Paul, &c.*, 33 Minn. 253 (22 N. W. 538); *Morgan v. Griffith*, 7 Mod. 380; *Perreau v. Bevan*, 5 Barn. & C. 284; *Jackson v. Hanson*, 8 M. & W. 477; *Tummons v. Ogle*, 37 Eng. Law and Eq. 15; *Gibbs v. Bartlett*, 2 Watts & S. 29; *Brown v. Parker*, 5 Blackf. 291; *Berghoff v. Heckwolf*, 26 Mo. 511; *Mills v. Gleason*, 21 Cal. 280; *Smith v. Whiting*, 100 Mass. 122; *Parott v. Scott*, 6 Mont. 340; *Manning v. Manning*, 26 Kan. 98; *Wood v. Coman*, 56 Ala. 283.

² *Boom v. St. Paul, &c.*, 33 Minn. 253 (22 N. W. 538); *Balsly v. Hoffman*, 13 Pa. St. 603; *Gardiner v. McDermott*, 12 R. I. 206; *Persse v. Watrous*, 30 Conn. 139; *Manning v. Manning*, 26 Kan. 98; *Hall v. Smith*, 10 Iowa, 45; *Smith v. Whiting*, 100 Mass. 122; *Elliott v. Black*, 45 Mo. 372; *Howard v. Reed*, 29 Mo. 472.

³ *Pierce v. King*, 14 R. I. 611; *Flagg v. Tyler*, 3 Mass. 303; *Roman v. Stratton*, 2 Bibb. 199; *McDermott v. Isbell*, 4 Cal. 113; *Mills v. Gleason*, 21 Cal. 274; *Sherry v. Foresman*, 6 Blackf. 56; *Berghoff v. Heckwolf*, 26 Mo. 511; *Wiseman v. Lynn*, 39 Ind. 250; *Persse v. Watrous*, 30 Conn. 139.

effect; second, make return of said property if return be awarded; and third, save and keep harmless the officer in replevying the same. Upon the impaneling of a jury to try the case the plaintiff took a nonsuit. This was a clear breach of the first condition of the bond.¹ And costs incurred in getting the property back, or on the *retorno habendo*, are recoverable as a breach of the second condition of the bond.² The dismissal is a breach of the bond, even though it was ordered on motion of the obligee in the bond on account of the defect in the writ.³ In suit on replevin bond, where the original replevin suit is dismissed without a trial of the merits, and *retorno* ordered, a failure to return the property in accordance with the judgment of the court constitutes a breach of the replevin bond, for which the obligee will be entitled to recover nominal damages and costs.⁴ Where the suit is dismissed and no return ordered, it is a breach of the bond to prosecute with effect, and the sureties are liable.⁵

§ 1257. **Failure to enter the suit in court is a breach.** The object of a replevin bond is to indemnify the defendant in replevin, and is not merely to secure to the defendant the execution of any judgment he may recover. When, therefore, the plaintiff fails to enter the suit in court as required by law, he has failed to comply with that obligation of his bond that requires him to prosecute the suit to final judgment. The provision for the entry of judgment for a return, in such cases, is for the benefit of the defendant in replevin, and not for the benefit of the plaintiff or his sureties, and it

¹ *Langdoc v. Parkinson*, 2 Bradw. (Ill.) 136; *Humphrey v. Taggart*, 38 Ill. 228.

² *Langdoc v. Parkinson*, 2 Bradw. (Ill.) 136.

³ *Waddell v. Broadway*, 84 Ind. 537; *Sammons v. Newman*, 27 Ind. 508; *Caffrey v. Dudgeon*, 38 Ind. 512 (10 Am. R. 126).

⁴ *Scheer v. Schwabacher*, 17 Bradw. (Ill.) 78; *Chinn v. McCoy*, 19 Ill. 604; *Stevison v. Earnst*, 80 Ill. 513.

⁵ *Wisemann v. Lynn*, 39 Ind. 250; *Brown v. Parker*, 5 Blackf. 291; *Wheat v. Catterlin*, 23 Ind. 85; *Potter v. James*, 7 R. I. 312; *Roman v. Stratton*, 2 Bibb. (Ky.) 199; *Elliott v. Black*, 45 Mo. 372; *Howard v. Reed*, 29 Mo. 472.

is no defense to an action on the replevin bond that this was not done.¹ It is the duty of a plaintiff in a replevin suit to see that all the necessary steps are taken to bring the cause to trial, in order that both parties may have an opportunity to present their claims, and that the question of title may be fully determined. A failure to do this, either through his own negligence or the negligence of the officer employed by him, is a failure to prosecute to effect, and subjects him to an action on his bond.² If the condition of the bond or undertaking is that the plaintiff shall prosecute his suit to effect without delay, or return the goods, it is broken by the withdrawal by the plaintiff of the writ of replevin from the hands of the officer before the return day, and the discontinuance of the action.³

§ 1258. **A contrary rule held where the "court" was absent.** Where, on the day of trial, both parties attended, but the justice was absent and the suit was no further prosecuted, in an action on the bond, *held*, that the replevin suit was prosecuted as far as the plaintiff therein was able to prosecute, and the abatement of the suit by reason of the absence of the justice was not a breach of the condition in the undertaking to prosecute.⁴ The defendant's remedy in this case, if the plaintiff retained the property, would be to

¹ *Gardiner v. McDermott*, 12 R. I. 206; *Lindsay v. Blood*, 2 Mass. 518; *Smith v. Whiting*, 100 Mass. 122; *Id.*, 97 Mass. 316; *Roman v. Stratton*, 2 Bibb. 199; *Morgan v. Griffith*, 7 Mod. 380; *Perreau v. Bevan*, 5 B. & C. 284; *Persse v. Watrous*, 30 Conn. 139; *Gibbs v. Bartlett*, 2 W. & S. (Pa.) 29; *Bank v. Hall*, 107 Pa. 583.

² *Allen v. Woodford*, 36 Conn. 143. In this case the officer served the papers properly and took the property, but never made return to the court, and nothing further was ever done with the suit, and defendant brought suit on the bond. The sureties made the defense that it was no breach, as the failure of jurisdiction on account of no return was no fault of the plaintiff, but the court held that it was a breach of the clause in the bond "that he will prosecute the suit to effect." See *Persse v. Watrous*, 30 Conn. 139.

³ *Persse v. Watrous*, 30 Conn. 139; *Humphrey v. Targatt*, 38 Ill. 228; *Gent v. Cutts*, 12 Jur. (Eng.) 113.

⁴ *Pierce v. Hardee*, 1 Thomp. & C. (N. Y.) 557.

bring replevin for it, or, if allowed by statute, to arrest the original plaintiff for the unlawful detention.

§ 1259. **Where the suit abates by removal of the court, bond not liable.** Where, in consequence of the removal of a justice from the township, a replevin suit commenced before him has abated, after the property had been taken upon the writ by the officer, a judgment upon the replevin bond upon special findings is not warranted in the absence of any finding that the property had ever been delivered to the plaintiff in replevin, or was detained by him after the abatement of the suit. The remedy of a defendant who has thus been deprived of his property by a replevin suit, which has been so abated, is an action of replevin to recover it, or possibly of trover for its value, and not by an action on the replevin bond.¹

§ 1260. **Failure in the suit is a breach of this condition.** A verdict for defendant is, in effect, a finding that the plaintiff unlawfully took the property, that the defendant is entitled to the possession of it, and that there has been a breach of the replevin bond in that the action has not been prosecuted with effect.²

§ 1261. **Failure by death or other act of God.** If the plaintiff die pending the suit, and under the law of that jurisdiction the suit abates, it has been held to not be a breach of the condition to prosecute with effect, and that no action would lie for the non-performance of a condition made impossible by the act of God.³ An action on a replevin bond

¹ Kidder v. Merryhew, 32 Mich. 470.

² Wheat v. Catterlin, 23 Ind. 85; Rankin v. Kinney, 7 Bradw. (Ill.) 215.

³ Badlam v. Tucker, 1 Pick. 284; Ormand v. Brierly, Carth. 519; Bacon's Abd. Title, Replevin D; Persse v. Watrous, 30 Conn. 147; Green v. Barker, 14 Conn. 431; Parsons v. Williams, 9 Conn. 236; Burkle v. Luce, 1 Comst. (N. Y.) 163; Id., 6 Hill (N. Y.), 558; Morris v. Matthews, 2 Ad. & El. (N. S.) 297.

does not abate by death.¹ This is a matter of statute in each state.

§ 1262. **The obligors may limit their liability to the successful trial in justice court.** If the bond plainly show this was their intention, it will be upheld. If an undertaking, in an action of replevin commenced in justice court, limits the liability of the person who executes it to a judgment for a return of the property rendered by the justice, and such judgment is not recovered in the justice court, a recovery cannot be had on the undertaking, even if, on appeal, such judgment is rendered by the county court. If the statutory form of the undertaking is followed, the defendant can recover the value of the property and costs upon a judgment in his favor in the appellate court.² In all cases the court should see that a proper statutory bond is given.

§ 1263. **But ordinarily the obligation refers to the final termination,** and is equally binding whether that final judgment be rendered in the court in which given or another court to which it has been removed. Plaintiff is bound to follow and successfully prosecute it no matter where carried. This was the common law rule,³ and the same rule has been followed in the states. A replevin bond covers the costs of all courts, even though the case be removed upon *certiorari* from before a justice, if a final judgment on writ of error award all costs.⁴ It is no defense to a suit on a bond that it was given in one court, and the action, by a special statute, was transferred to and tried in another court. The obligation of the bond is that the suit will be prosecuted to effect

¹ *Waples v. McIlvain*, 5 Harr. (Del.) 381.

² *Mitchum v. Stanton*, 49 Cal. 302.

³ *Balsley v. Hoffman*, 13 Pa. St. 603; *Gibbs v. Bartlett*, 2 W. & S. (Pa.) 34; *Blacket v. Cressop*, 1 Lutw. 688; *Butcher v. Potter*, 1 Shaw, 400; *Lane v. Foulk*, Comb. 228; *Gwillim v. Halbrook*, 1 Bos. & Pul. 410; *Vaughn v. Norris*, c. t. H. 137.

⁴ *Monroe v. Standish*, 46 Mich. 12 (*Monroe v. Heintzman*, 8 N. W. 571).

wherever the law places it.¹ The soundness of this doctrine was questioned in West Virginia, in a case commenced in state court, and removed to the federal court, and suit afterwards brought on the bond in state court.² But as we have shown the replevin suit is removable from the state to the federal courts, *ante* § 331, there is no reason why the bond should not answer for any judgment rendered there, as that was one of the possible and probable results of the suit when they assumed the obligation, just as much as the possibility of defeat in the state court.

§ 1264. **The replevin action must be finally ended or suit on bond may be enjoined.** No action can be brought on the bond so long as an appeal is pending; the conditions of the bond do not become fixed and determined until the final determination of the action.³ Where defendant was successful in replevin and thereafter brought suit on the bond, and obtained judgment (in the meantime plaintiff had, without giving a supersedeas bond, taken the replevin case to the supreme court and reversed it) *held*, that it was proper for the trial court to vacate the judgment on the bond upon this showing.⁴ Where, after the removal of a replevin suit from a state to the federal court, the state court went on and rendered judgment for a return, and suit was brought on the bond for a failure to return, *held*, that the federal court would interfere by injunction to restrain the suit on the bond in the state court.⁵

§ 1265. **The condition to return, if return be awarded,** is the most important, because the most frequently violated, of any of the conditions of the bond. The duties imposed upon the defeated party by this obligation are to take active

¹ *Reusch v. Demass*, 34 Mich. 95.

² *Riggs v. Parsons*, 29 W. Va. 522 (2 S. E. 81); citing *Myers v. Parker*, 6 Ohio St. 501.

³ *Corn Exch. Bank v. Blye*, 102 N. Y. 305 (7 N. E. 49).

⁴ *McMillan v. Baker*, 20 Kan. 50.

⁵ *Dietzsch v. Huidekoper*, 103 U. S. 494; *French, trustee, v. Hay*, 22 Wall. 250.

steps to place the successful party in as good condition as he was before the suit was commenced, by a return of the property to him in as good condition as when taken. This is never a pleasant duty, and one which the history of replevin litigation shows has been evaded on every pretext which the ingenuity of the profession could devise. For a more full discussion of this subject the reader is referred to chapter XXXVII on Proper Return, Part II. Suffice it to say here, that until the judgment of return is satisfied, either by a return of the property or the payment and acceptance of its alternate value as found by the court, a cause of action exists on the bond, and no precedent steps are necessary to be taken before suing upon the bond.

§ 1266. **Demand for return not necessary.** A defendant in replevin, who has recovered a judgment for a return, may maintain an action upon a replevin bond, upon failure of the plaintiff in replevin to return the property, without a previous demand or suing out a writ of return. The execution of the bond being admitted and a breach thus shown, the plaintiff is entitled to a judgment.¹ In the absence of any statute it is not necessary to have a writ of return issue; it is sufficient that the order for a return was made and has not been complied with.² But several states provide that a writ of return must be issued and returned unsatisfied before suit can be brought on the bond. Such provisions must of course be complied with. Under such a statute the proof of a nonsuit in the original action and order for a return, and the return of the writ *de retorno habendo* without the goods, are sufficient proof of the breach of the bond.³ The

¹ Wright v. Quirk, 105 Mass. 44; Douglas v. Douglas, 21 Wallace (U. S. S. Ct.), 98; Sweeney v. Lomme, 22 Wallace, (U. S. S. Ct.) 214; Cook v. Lathrop, 18 Me. 260; Parker v. Simmonds, 8 Met. 205; Davis v. Harding, 3 Allen, 302; Leighton v. Brown, 98 Mass. 515; Leonard v. Whitney, 109 Mass. 265.

² Peck v. Wilson, 22 Ill. 206; Robertson v. Davidson, 14 Minn. 554; Gould v. Warner, 3 Wend. 54; Knapp v. Colburn, 4 Wend. 618; McFarland v. McNitt, 10 Wend. 330.

³ Hood v. Spaeth (N. J.), 16 A. 163.

sureties in an undertaking for the claim and delivery of property, that is in the hands of a sheriff under the writ of attachment, are liable for the damages which may be sustained by the officer and the attaching creditors by a failure to return the property. Their liability cannot be extended by statute, or the judgment rendered in the action. Their contract is that the principal will return the property if a return be ordered, and that he will pay any judgment that may be rendered against him, and an action can be brought against them without a demand of a return.¹ It is no defense to suit on the bond for a failure to return to say that the sheriff did not take the property when he could.² Judgment for a return uncomplished with constitutes a breach.³ Where the condition is to make return, if return be awarded, there can be no breach if no judgment of return.⁴

§ 1267. **The judgment of return in replevin is conclusive on the sureties.** The sureties upon a bond, in an action against them upon it, cannot controvert the validity of the judgment; and it is generally sufficient, to maintain the action, that a return of the property or an award of damages was adjudged, and that there has been a failure to comply with the judgment in this respect.⁵ A judgment for defendant in the replevin suit constitutes a breach of the replevin bond, and when admitted in evidence is conclusive of a right to recover upon the bond, saving the right of the plaintiff in replevin to prove his title to the property in mitigation of damages.⁶ The right of the defendant in replevin to the possession and return of the property is determined by

¹ *Lomme v. Sweeney*, 1 Mont. 584; *Whitney v. Lehmer*, 26 Ind. 504; *Mason v. Richards*, 12 Iowa, 73.

² *Jeninson v. Haire*, 29 Mich. 209; *Burkle v. Luce*, 6 Hill. 558; *Peck v. Wilson*, 22 Ill. 206.

³ *Smith v. Pries*, 21 Ill. 656; *Davis v. Harding*, 3 Allen, 302.

⁴ *Clark v. Norton*, 6 Minn. 415; *Ladd v. Prentice*, 14 Conn. 117.

⁵ *Peck v. Wilson*, 22 Ill. 205; *Mason v. Richards*, 12 Iowa, 73. See *Southerland on Damages*, p. 47-8.

⁶ *Rankin v. Kinny*, 7 Bradw. (Ill.) 215.

the judgment. When no return is awarded in the judgment for defendant, it will be presumed that it was made to appear that the plaintiff had become entitled to the possession of the property.¹

§ 1268. **The failure to pay a money judgment or costs,** awarded against the plaintiff, is a breach for which an action lies on the bond, and no demand is necessary before suing on the bond.² Where defendant had judgment for costs, but not for a return, and plaintiff having no property was arrested and committed and released under the poor debtor's act, *held*, that the replevin bond was forfeited and on judgment for the penalty, execution should issue for the costs.³ This on the theory that the bond covenants to pay the judgment that is rendered, and that the money judgment has become absolute by a failure to return the property, or a finding of the court that it could not be returned, and the entry of an absolute money judgment. In replevin the delivery of the property to the plaintiff is the primary object of the action. The value is to be recovered in lieu of it, as an alternative, only in case a delivery of the specific property cannot be had. After judgment "for the delivery of the property or the value thereof, in case a delivery cannot be had," the defendant has no right to pay the assessed value of the property and retain it as his own against the will of the plaintiff, although he has given a bond conditioned for the performance of the judgment, and thus had the property restored to him.⁴

¹ *Vinyard v. Barnes*, 124 Ill. 346 (16 N. E. 254).

² *Cook v. Lathrop*, 18 Me. 260.

³ *Hovey v. Coy*, 17 Me. 266.

⁴ *Swantz v. Pillow*, 50 Ark. 300, Mansf. Dig. § 5181; *Harris v. Harris*, 43 Ark. 535.

CHAPTER XLII.

ACTION ON BOND—HOW BROUGHT.

	Section.		Section.
Debt is the proper form of action on the bond . . .	1269	regard to return and demand thereof . . .	1276
What facts are material to be alleged	1270	Allegations by officer or other party having only a special interest . . .	1277
The same	1271	Malice need not be alleged .	1278
Copies of pleadings in replevin are no part of the petition	1272	Bond executed in wrong name, how sued . . .	1279
One cause of action well stated is sufficient . . .	1273	Defect apparent on face of bond after <i>oyer</i> may be reached by demurrer .	1280
Proper and improper allegations—Illustrations . .	1274	In variance between bond and petition, recitals of	
The same	1275	bond will govern . . .	1281
The same—Illustrations—In			

§ 1269. **Debt is the proper form of action on the bond** where the distinction between the different forms of actions is still preserved.¹ The usual form of declaration in debt upon a penal or other bond may be followed. The assignment of the breaches should be a plain statement of the facts, and need not be in broader terms than the conditions in the bond.² Under the statutes or practice acts, now in force in most of the states, a plain statement of the facts with the amount of the damage and prayer for relief will be sufficient. Any peculiarity in the local law must be followed and complied with.

§ 1270. **What facts are material to be alleged.** The first material fact is the commencement of the replevin suit, issuance of the writ, and the taking of the property. Second,

¹ Pratt v. Donovan, 10 Wis. 378.

² Humphrey v. Taggart, 38 Ill. 228.

the giving of the bond; usually a copy should be set out. Third, the termination of the replevin suit, or the failure to prosecute it without delay. Fourth, the final order, if one was made, and the failure to comply with that order, (and issue and return *nulla bona* of execution if required by statute). Fifth, damage, etc. The record in the replevin suit need not be recited in the petition, merely the conclusions given, and on the trial it should be introduced in evidence.¹ Where the law permits the defendant to give bond and retain the property, the fact that the property was returned to him should be alleged.² Assignment of the breach need not be in any technical or formal manner. A statement which shows that the obligors have failed to keep any one of their obligations is sufficient. The statement that defendant did not prosecute the replevin suit with effect, but failed to do so, is sufficient to show a breach of the obligation to prosecute with effect.³

§ 1271. **The same.** The statutory provisions in the various states, relating to the remedy on the bond, or undertaking of the defeated party in replevin, are so varied that it would be impracticable, within the limits of this work, to treat of them in detail. In general, the successful party in the replevin suit can only proceed against the sureties on the bond after a failure to satisfy his judgment on execution against his adversary, or on special execution for the return of the property.⁴ The material facts to be alleged in a dec-

¹ Gould v. Warner, 3 Wend. 67; McGinnis v. Hart, 6 Iowa, 204; Nunn v. Goodlett, 5 Eng. (Ark.) 89; Eldred v. Bennett, 33 Pa. St. 183.

² Nickerson v. Chatterton, 7 Cal. 570.

³ Woolridge v. Quinn, 49 Mo. 427; Miller v. Commissioners, 1 Ohio, 271; Humphrey v. Taggart, 38 Ill. 228.

⁴ In some states the remedy is by *scire facias*. Thompson v. Raymon, 8 Miss. 186. In others an execution issues against the sureties after a return by the sheriff, that the bond is forfeited. Frei v. Vogle, 40 Mo. 149. In others, the proceedings to recover judgment on the bond are summary. Harker v. Arndell, 74 N. C. 85. In others, the action is an ordinary action on the bond for its breach. David v. Bradley, 79 Ill. 316; Pick v. Wilson, 22 Ill. 205.

laration on a replevin bond are the termination of the suit, and judgment for costs in the defendant's favor, and the order for the writ *retorno habendo*, and failure to satisfy this order. It is wholly unimportant what led to that result, or in what phraseology it was declared.¹

§ 1272. **Copies of the pleadings in replevin are no part of the petition.** In a complaint on a replevin bond for a breach thereof in failing to return the property after a judgment therefor, it is not necessary to aver who were sureties and who principals in the bond, or to file copies of the writ of replevin, and the return of the officer thereon with such complaint.²

§ 1273. **One cause of action well stated is sufficient.** A declaration alleging breaches of several conditions of a replevin bond is good, if it state a good cause of action upon one of the breaches, though the others be defectively alleged.³

§ 1274. **Proper and improper allegations—Illustrations.** In an action of debt upon a replevin bond, the petition need not allege that the court in which the replevin action was pending had jurisdiction, as the obligor is estopped to deny the jurisdiction, it being a court of his own seeking.⁴ Where, in an action of debt on a replevin bond, the bond is stated in legal effect in the declaration, it is unnecessary to prove its execution.⁵ Where the replevin bond was for a delivery of the property "in case the return thereof shall be awarded," a petition which only alleges *a failure to deliver* is bad upon demurrer. It must allege that a return was awarded also. The breach assigned must be as broad as the condition of

¹ *Stevison v. Earnest*, 80 Ill. 513.

² *Shappendocia v. Spencer*, 73 Ind. 133.

³ *Fisse v. Katzentine*, 93 Ind. 490.

⁴ *Bates v. Schoonover*, 43 Ill. 494.

⁵ *Horner v. Boyden*, 27 Ill. App. 573. The Illinois statute requires that the execution of the bond in such cases be denied by a verified plea, § 33, practice act. See *Reed v. Phillips*, 4 Scam. 39; *Delahay v. Clement*, 2 Scam. 575; *Gaddy v. McCleave*, 59 Ill. 182.

the bond.¹ A petition which sets out the proceedings in which the defendant obtained the writ, the filing of the bond in replevin, the failure to prosecute, the rendering of a judgment upon the trial in favor of defendant therein, and the failure to pay or satisfy this judgment as required by the terms of the bond, is sufficient.² A complaint in an action on a replevin bond, which alleges that the suit of replevin was commenced against A and B, and that the property replevied was in the possession of both of them, and that judgment was rendered in favor of the defendants, shows a cause of action in favor of B, although it avers further that the lumber belonged to A.³ A complaint upon a statutory undertaking, describing the undertaking only by stating that it corresponds with the provisions of the statute, is defective; but the defect is rather in form than in substance, and can be availed of only by objection before trial.⁴

§ 1275. **The same.** Where the writ was quashed for errors on its face and no judgment for return entered, and the defendant in replevin brought suit on the bond, alleging the breach to be the failure to prosecute the action to effect, *held*, that under this assignment of a breach the value of the property or damages for its return could not be recovered.⁵ In an action on a replevin bond in New York, it is not necessary to allege the title or estate of the defendant in the action of replevin in the premises, for the rent of which the distress was made, nor to aver the making of an affidavit previous to a distress for rent in the city of New York, nor to state the avowry or cognizance.⁶ Where the complaint alleged that "it was adjudged that plaintiff take nothing by "his writ," and a writ of *retorno habendo* was awarded and

¹ Colorado Springs Co. v. Hopkins, 5 Col. 206; Pick v. Wilson, 22 Ill. 205; Hunter v. Sherman, 2 Scam. 539.

² Keys v. McNulty, 14 Iowa, 484.

³ Story v. O'Dea, 24 Ind. 326.

⁴ Mills v. Gleason, 21 Cal. 274.

⁵ Wall v. Humphreys, 4 Dana (Ky.), 209.

⁶ Gould v. Warner, 3 Wend. (N. Y.) 54.

delivered to the officer, and that the plaintiff did not prosecute his suit with effect or make return, *held*, that it sufficiently alleged a breach of the bond.¹ In petition on undertaking in replevin, facts were alleged showing the commencement of the action, the undertaking for the immediate delivery of the property in controversy, its delivery, and the failure to prosecute the action of replevin, or redeliver the property. The petition then alleges that by reason of the premises aforesaid, said undertaking has become forfeited to this plaintiff, and an action has accrued to this plaintiff against the said defendants, jointly and severally, and he hath right to demand and have from the said defendants the said sum of \$1200. *Held*, that the facts so stated are sufficient to constitute a cause of action.²

§ 1276. **The same. Illustrations in regard to return and demand thereof.** In a suit against the sureties on a bond given in a replevin suit, a complaint is not sufficient which does not aver that the value of the property was found by the jury, and that an alternative judgment was rendered and not complied with.³ In an action on a replevin bond, it is not necessary to aver the issuing and return of an execution upon the judgment rendered in replevin.⁴ Where the petition alleged that by virtue of the replevin bond sued on, the property was taken from plaintiff and delivered to defendant, etc., *held*, sufficient and not necessary to allege a special demand of the property replevied.⁵ In an action on a replevin bond it is not necessary to aver the issuing of a writ *de retorno habendo* and a return of *elongata*, but in an action against a sheriff for taking insufficient bond such averments are necessary.⁶ In an action on a replevin bond, the

¹ Manning v. Pierce, 3 Ill. (2 Scam.) 4; Hunter v. Sherman, 3 Ill. 539.

² Cooper v. McGrew, 8 Or. 327.

³ Clary v. Rolland, 24 Cal. 147.

⁴ Jennison v. Haire, 29 Mich. 207.

⁵ Cushenden v. Harman, 2 Tyler, (Vt.) 431.

⁶ Knapp v. Colburn, 4 Wend. (N.Y.) 619; Hunter v. Sherman, 3 Ill. (2 Scam.) 539; Duggon v. England, Harp. (S.C.) 215.

plaintiff need not allege demand of the property replevied upon the execution in the original suit, or notice to either of the obligors in the bond.¹ In an action on a replevin bond, it must be alleged that the property was restored to the plaintiff in replevin.² A petition which fails to allege that execution had been issued on the judgment in replevin and returned unsatisfied is bad on demurrer.³ A defendant in replevin cannot maintain an action on the replevin bond against the surety, the plaintiff having failed to prosecute his action, until he has obtained some judgment against the plaintiff on which execution has been returned unsatisfied in whole or in part.⁴ In order to support an action upon a replevin bond it is not necessary for a judgment *de retorno habendo* to have been entered in the replevin suit, or for the damages to have been assessed.⁵

§ 1277. **Allegations by officer or other party having only a special interest in the property.** Where the property of a judgment debtor, levied upon to satisfy the judgment, is replevied from the sheriff by third parties, who fail to prosecute the replevin action, in an action by the judgment creditor on the undertaking in replevin, his right to recover rests upon his right to have the replevied property applied to the payment of the judgment in the original action, and when his complaint alleges that execution has issued on the original judgment, but does not allege that the judgment has not been satisfied, it is fatally defective. The com-

¹ *Wetherbee v. Colby*, 6 Vt. 647; *Peck v. Wilson*, 22 Ill. 205.

² *Nickerson v. Chatterton*, 7 Cal. 568.

³ *Hershiser v. Jordan*, 25 Neb. 275 (41 N. W. 147). Section 196 of the code, provides "that no suit shall be instituted on an undertaking "in replevin until an execution issued on a judgment, in favor of a defendant in an action, shall have been returned, that sufficient property "whereon to levy and make the amount of such judgment cannot be "found in the county."

⁴ *Pemble v. Clifford*, 2 McCord (S. C.), 31; *Scott v. Elliott*, 63 N. C. 215; *Cowden v. Pease*, 10 Wend. (N. Y.) 333; *Cornish v. Kusee*, 17 Ark. 391.

⁵ *Gibbs v. Bartlett*, 2 W. & S. (Pa.) 29; *Bank v. Hall*, 107 Pa. 583.

plaint must allege the delivery of the bond but need not allege its assignment by the officer to the plaintiff.¹

§ 1278. **Malice need not be alleged.** In an action on a detinue bond it is not necessary to allege that the writ was sued out wrongfully or maliciously, nor to set out the affidavit on which the writ was issued, or to take any notice of it, nor to allege that the plaintiff in the detinue suit did not have probable cause to sue; but an averment that plaintiff "did fail in his said suit in detinue, and has wholly failed "to pay plaintiff his costs and damages, sustained by reason "of the wrongful suing out of said detinue writ," is a sufficient averment of damage and states a cause of action.²

§ 1279. **Bond executed in wrong name how sued on.** When the true name of the obligor is *Joshua P. C.*, while the signature to the bond is *J. P. C.*, and by mistake the name is written in the body of the bond, *James P. C.*, the obligor may be sued by his true name, with an averment that he signed the bond by the name of *J. P. C.*, and in the absence of a plea of *non est factum* the bond would be admissible in evidence notwithstanding the mistake.³

§ 1280. **Defect apparent on face of bond sued on after oyer may be reached by demurrer.** The tenor of the bond declared on, as it appears upon *oyer*, is a part of the petition, and it is competent for the defendant to avail himself of any defect apparent upon the face of the bond, or variance between its terms and the allegations in the declaration, after *oyer* by demurrer.⁴

¹ Parrott v. Scott, 6 Mont. 340 (12 P. 763); Winsor v. Orcutt, 11 Paige, 578; Hedderick v. Pontet, 6 Mont. 345 (12 P. 765).

² Baker v. Pope, 49 Ala. 415. See Anderson v. Dickson, 8 Ala. 733; Watt's Exrs. v. Sheppard, 2 Ala. 425; Pryor v. Beck, 21 Ala. 393.

³ Wood v. Coman, 56 Ala. 283. See Taylor v. Strickland, 37 Ala. 644, and cases cited. It has been held that where a contract was signed in an assumed name, suit must be brought on the assumed name, and a plea of misnomer would not avail the defendant. Gould v. Barnes, 3 Taunt. 503; Wooster v. Lyons, 5 Blackf. 60.

⁴ Matthews v. Storms, 72 Ill. 316.

§ 1281. In variance between bond and petition, recitals of bond will govern. Where the petition alleges that the bond sued on "is herewith filed," and then, in stating the conditions of the bond, varies or misstates them, the recitals of the bond will control, and the variance is not available on demurrer. Where the petition alleges that the defendants have failed and refused to pay the judgment rendered in the replevin proceedings, it is not necessary to aver that it is in force and unappealed from.¹ Where the declaration in stating the bond payable three months after date, says nothing of interest, and *oyer* is given of a bond bearing interest from date, the variance is fatal.²

¹ Blackburn v. Crowder, 108 Ind. 238 (9 N. E. 108).

² Salter v. Richardson, 3 T. B. Mon. (Ky.) 204. In the first case the bond was made part of the petition, so that the variance was between the two parts of the petition. In the second case it was between the petition and the proof.

CHAPTER XLIII.

VALIDITY AND CONSTRUCTION OF BONDS.

	Section.		Section.
A bond in replevin will be construed liberally for the purpose for which it was given	1282	Replevin bonds not dated, date from their delivery . .	1288
The same—Illustrations	1283	Bonds taken under repealed law are void	1289
The delivery of the property to the plaintiff in replevin is a sufficient consideration	1284	Surety not mentioned in body of bond—Mistake in name in body of bond—Not fatal	1290
That the bond never was delivered is a good defense	1285	But if defendant in replevin take advantage of such error to dismiss the action, he cannot then ask to recover on the bond	1291
Bond may be valid though not signed	1286	Void bonds—Illustrations	1292
If the bond is good at common law, a recovery may be had thereon	1287	Disability of one surety does not release the co-obligors on the replevin bond	1293

§ 1282. A bond in replevin will be construed liberally for the purpose for which it was given, and will be sufficient to support the action though not in strict conformity with the statute.¹ Thus, though a sheriff is required by statute to take a bond in replevin from the plaintiff before serving the writ, a bond executed afterward will be valid.² A bond with condition to indemnify the sheriff, instead of to prosecute the suit, is good.³ Under a statute requiring the bond in replevin to be for the "return of the property" "to the defendant in case judgment for a return of such

¹ Fawknor v. Baden, 89 Ind. 587.

² Nunn v. Goodlett, 12 Ark. 89.

³ Lambden v. Conoway, 5 Harr. (Del.) 1. See Whittermore v. Jones, 5 N. H. 362

"property is rendered against him," a bond omitting this, but having all the other statutory requirements, creates a binding obligation.¹ A replevin bond, made in pursuance of the requirements of a statute, should be construed and given effect according to the legal intention of the parties, although by a clerical error the name of the plaintiff is inserted in one place where that of the defendant should be, the mistake being obvious, and the intention apparent.² A bond by which the obligors acknowledge themselves "held and "firmly bound unto" the obligee in the specified penalty "for the payment of which," it is declared, "we, and each "of us *bind our heirs, administrators, and assigns*," binds the obligors personally, notwithstanding the omission of the word, "*ourselves*."³ A bond given to the bailiff of a landlord, with the condition to prosecute an action of replevin, etc., in consideration of which he delivered up the distress, *held*, to be equally binding as if given to the landlord himself.⁴ A bond given to the sheriff instead of to the plaintiff as required by statute does not authorize a summary judgment against the sureties in the replevin action, but might be sufficient to maintain an action at law.⁵ A bond given to an unauthorized deputy and without the word "seal" is nevertheless obligatory on the maker and sureties.⁶

§ 1283. **The same—Illustrations.** Where the sheriff by mistake took an indemnity bond instead of a replevin undertaking, *held*, that the obligors could not escape liability on this ground that it was a good and valid instrument, and that a failure to pay the judgment according to the undertaking of the indemnity bond fixes and determines the measure of the liability of the obligor.⁷ It is no objection

¹ Hicklin v. Nebraska, &c., 8 Neb. 463.

² Green v. Walker, 37 Me. 25.

³ Wood v. Coman, 56 Ala. 283.

⁴ Bofil v. Russ, 3 Stro. (S. C.) 98.

⁵ Wooldridge v. Quinn, 49 Mo. 425.

⁶ Henach v. Chaney, 61 Mo. 129.

⁷ Martin v. Bolenbaugh, 42 Ohio State, 508; Wilson v. Stilwell, 9

to a replevin bond that, in reciting the judgment on which it is predicated, it omits a credit entered on the judgment.¹ The validity of a replevin bond given to replevy a distress for rent is not affected by the fact that too great an amount of rent is distrained for.² Where both personal and real property is attached and a replevin bond is given, it will be presumed that it was given for the forthcoming of the personal property, and as applying to that only.³ After judgment the defendants are estopped to set up technical defects in the execution of the bond.⁴ A replevin bond conditioned in the sum of \$2,000 "to produce the property, if demanded, in as good condition as it then was, and "deliver it to the proper "officer of the court," will be regarded as a bond in double the value of the property conditioned to pay its value and interest in the event defendant be cast in the suit, and the proper judgment thereon is for the penalty of the bond, which may be satisfied by the delivery of the property or payment of its value.⁵ When the terms of the instrument render it possible, the court will always adopt that construction which gives to the bond some force and effect and not one that annuls it,⁶ and will, if possible, carry out the intention of the parties in making the instrument,⁷ usually giving the words their common, ordinary meaning.⁷ If their meaning is unintelligible or not explicit, the court will supply these defects according to the intention of the parties if that is apparent.⁸ When the condition of the bond was that it should be void if the obligor should "*not*" pay, etc., the court pre-

Ohio St. 467; Webb v. Pond, 19 Wend. 423; Conkey v. Hopkins, 17 Johns. 113; Kirskey v. Friend, 48 Ala. 276.

¹ Doe v. Cunningham, 6 Blackf. (Ind.) 430.

² Dean v. Ball, 3 Bush. (Ky.) 502.

³ Miles v. Davis, 36 Tex. 690.

⁴ Hartlepp v. Cole (Ind.), 22 N. E. 130.

⁵ Kuhn v. Spellacy, 3 Lea. (Tenn.) 278.

⁶ 2 Bla. Com. 179; Mitchell v. Ingram, 38 Ala. 395.

⁷ Hawes v. Smith, 3 Fairfield (Me.), 429.

⁸ Teall v. Van Wyck, 10 Barb. 377.

sumed that the introduction of this word "*not*" was a mistake, and permitted a recovery on what must have been the true intent of the parties.¹ So where the word "pound" was omitted as a sign of the denomination of the amount of money intended to be secured, it was *held* to not defeat a recovery.² Where the bond bound plaintiff to prosecute, etc., and on defeat to pay such sum as the said (name of plaintiff) shall recover, *held*, to be a clerical error and not to defeat a recovery.³ And where the bond was signed after the writ was served, this was *held* to not defeat a recovery.⁴

§ 1284. The delivery of the property to the plaintiff in replevin is a sufficient consideration for the bond given to secure its possession.⁵ No consideration is necessary to support an undertaking given upon a claim for the delivery of personal property, pursuant to the code, besides the claim itself, nor is it necessary that the undertaking should express a consideration. The obligors are estopped from disputing its validity.⁶

§ 1285. That the bond never was delivered is a good defense, and can be shown under the plea of *non est factum*; but where the first bond was defective and a new one was filed without an order of court, the makers of the second bond, in suit thereon, are estopped from alleging that it was given without any order therefor.⁷ The delivery is a part of the execution, and to be valid it must be executed, that is, signed and delivered, but this does not mean delivered to the officer or returned into court, where the law so requires. If, with the consent of the obligor, it has passed

¹ Bache v. Proctor, Doug. (Eng.) 367.

² Coles v. Hulene, 8 Barn. & Cess. 568.

³ Green v. Walker, 37 Me. 27.

⁴ Cady v. Eggleston, 11 Mass. 285; Nunn v. Goodlett, 5 Eng. (Ark.) 100; Reeves v. Reeves, 33 Mo. 28.

⁵ McFadden v. Fritz, 110 Ind. 1 (10 N. E. 120); Wolford v. Powers, 85 Ind. 294.

⁶ Harrison v. Utley, 6 Hun. 565; Bildersee v. Adin, 12 Abb. Pr. (U.S.) 324; Cook v. Horwitz, 14 Hun. (N. Y.) 542.

⁷ Treman v. Morris, 9 Bradw. (Ill.) 237.

beyond his control, it is delivered in the sense here meant so as to bind him. It is not essential to the validity of an undertaking for claim and delivery that it be delivered to the sheriff as required by statute, or that the statutory proceedings for which it is given be actually taken. The formalities of the proceeding may be waived and the sureties will not be released. They are estopped from questioning the recitals in the undertaking, and cannot show that the defendant was not in possession of the property and that the undertaking was not to be used to obtain delivery, etc.¹ A replevin bond, signed in blank on Sunday at church, and delivered to an agent who delivers it on a week day properly filled up, and returned by the officer without attestation or endorsement of approval, is good and will bind the sureties thereto.²

§ 1286. **Bond may be valid though not signed.** A replevin bond containing the principal's name in the body of it but not signed by him, is nevertheless valid as against the surety, if delivered by the latter with the intention that it shall be effective and binding.³ In order that the replevin bond should be considered a statute bond, it is not necessary that the plaintiff in replevin should sign the bond or that it should appear on the bond that it was given in his behalf.⁴

§ 1287. **If the bond is good at common law a recovery may be had thereon.** Though the bond may not follow the words of the statute, if it is not repugnant to some statute a recovery may be had thereon, or if it is good as a common law bond the person damnified may recover thereon.⁵ A

¹ *Harrison v. Wilkin*, 69 N. Y. 412. See *Coleman v. Bean*, 1 Abb. (Ct. of App.) 394; *Decker v. Judson*, 16 N. Y. 439.

² *Prather v. Harlan*, 6 Bush. (Ky.) 185; *Hopkins v. Chambers*, 7 Mon. (Ky.) 261. But in Indiana, a replevin bond signed on Sunday is void. *Link v. Clemmens*, 7 Blackf. 479.

³ *Cahill's Appeal*, 48 Mich. 616 (12 N. W. 877).

⁴ *Howe v. Handley*, 28 Me. 241.

⁵ *Parratt v. Scott*, 6 Mont. 340 (12 P. 763); *Hedderick v. Pontet*, 6 Mont. 345 (12 P. 765); *Claggett v. Richards*, 45 N. H. 360.

bond in less than double the value of the property replevied is a good replevin bond at common law.¹ An undertaking given in a replevin proceeding not provided for by the statute or not conforming to the statute, if acted upon as valid by both parties, will be held to inure as a good common law agreement, enforceable according to its terms.² When the bond under which the property was obtained has been voluntarily executed, it cannot be avoided on the ground that it does not conform to statutory requirements.³ Where the property has been surrendered because of the giving of the bond, it is no ground of defense for either the principal or his sureties, in a suit on the bond, that the bond was not adapted to the replevin action, but to some other form of action.⁴

§ 1288. **Replevin bonds not dated, date from their delivery** to the sheriff, and no execution can issue on such bonds until they are due, reckoning from the date of delivery.⁵ Where a replevin bond was sued on, dated prior to the execution on which it purported to be taken, the presumption of law is that there was a mistake in the date of one of them.⁶ The date is not important if the bond was signed and delivered and the property turned over on the strength of the giving of the bond; the exact time when it was done is immaterial.

§ 1289. **Bond taken under repealed law.** A writ to take property issued under a law which had been repealed is void, and the bond taken in such proceeding is absolutely

¹ *Turk v. Moses*, 54 Me. 115.

² *Goodwin v. Bunzl*, 102 N. Y. 224 (6 N. E. 399); *Branch v. Branch*, 6 Fla. 314; *Mitchell v. Ingram*, 38 Ala. 395. *Shaw v. Tobias*, 3 N. Y. (3 Comst.) 188.

³ *Morse v. Hodsdon*, 5 Mass. 314; *Simonds v. Parker*, 1 Met. 514.

⁴ *Clark v. Clinton*, 61 Miss. 337.

⁵ *Bettis v. Bailey*, 2 Bush. (Ky.) 608. The contract here is to pay unless the property be delivered within a certain time, say three months after return awarded.

⁶ *Cook v. Bank*, 5 J. J. Marsh (Ky.), 163.

void for all purposes, and no action can be maintained upon it though the obligor obtained the property and the bond has been treated as valid by all parties, and the same rule applies to a second bond, substituted for the first one in the same proceeding.¹ Where the change of the statute was only as to the manner of taking the bond, a different rule might apply; thus it has been held that replevin bond, taken according to a repealed statute with one surety only, is not void.²

§ 1290. **Surety not mentioned in body of bond—Mistake in name of party in body of bond—Not fatal.** The fact that the name of the surety is not mentioned in the body of the bond does not affect its validity. If he sign and seal it, it is sufficient, and he would be bound. When the bond recites that C. instead of S. sued out the writ, and from the whole instrument it is clear that S. was intended, it does not affect the instrument, and a recovery can be had thereon under the proper averments.³ It is no objection to a replevin bond in the first person plural, and signed by both principal and surety, that the name of the surety does not appear in the body of the bond.⁴ But it is essential to the validity of a replevin bond that the name of the defendant in the suit appear therein; being defective in that regard it is a nullity, and the omission cannot be supplied by averment or otherwise.⁵ A misdescription of the obligor in a replevin bond, when the records of the court show the error to have been subsequently corrected although no actual correction was made on the papers themselves, will not prevent the bond

¹ Hicks v. Mendenhall, 17 Minn. 453.

² Simonds v. Parker, 1 Metc. (Mass.) 508. See also Bigelow v. Comegys, 5 Ohio St. 256. But if motion or plea in abatement be made at the proper time, it will be declared void. Greely v. Currier, 39 Me. 516.

³ Affild v. The people, 12 Bradw. 502; Hibbard v. McKindley, 28 Ill. 254.

⁴ Clark v. Bell, 2 Litt. (Ky.) 164.

⁵ Arter v. The People, Use., &c., 54 Ill. 228; Matthews v. Storms, 72 Ill. 316.

being admitted in evidence under proper pleading, in a suit for damages thereupon.¹

§ 1291. **But if defendant in replevin take advantage of such errors to dismiss the action, he cannot then ask to recover on the bond.** Where a defendant in replevin procured the dismissal of a replevin suit on the ground that the bond did not contain the name of an obligee, he will not be allowed to reform the bond and recover on it. An action cannot be maintained on such a bond.² A plaintiff cannot be allowed to thus occupy inconsistent positions. See Defenses, Part II.

§ 1292. **Void bonds—Illustrations.** Bond taken by justice of peace in a case in which he has no jurisdiction is invalid for all purposes, and no recovery can be had thereon, and signers are not estopped to set up any defense even if contradictory to the recitals therein.³ But where the court had jurisdiction over the subject matter, the rule is different, and the sureties are estopped by the recitals of their bond.⁴ A bond taken to replevy property from an attachment by an officer not authorized to serve the attachment is void.⁵ No action will lie on a replevin bond, the penalty of which is "double the value of the property hereinafter mentioned to "be replevied," to be fixed by appraisers—no value being stated—especially if the value of the property is afterwards agreed between the parties, and never fixed by appraisers.⁶ The bond in replevin rests upon the writ. If that be absolutely void, the bond is also void, and no recovery can be had upon it.⁷ A replevin bond taken by a sheriff, not in accordance with the

¹ Blatchford v. Bayden, 18 Bradw. (Ill.) 379.

² Titus v. Berry, 73 Me. 127.

³ Caffrey v. Dudgeon, 38 Ind. 512; Tarbell v. Gray, 4 Gray, 444; Green v. Haskell, 24 Maine, 180; Libby v. Main, 2 Fairfield, 344; Bridge v. Ford, 4 Mass. 641.

⁴ Sammons v. Newman, 27 Ind. 508.

⁵ Lawrence v. Featherstone, 18 Miss. (10 S. & M.) 345.

⁶ Case v. Pettee, 5 Gray (Mass.), 27.

⁷ Rosen v. Fischel, 44 Conn. 371.

statute, does not bind the surety, and is no foundation for judgment against them, but it is evidence that their principal has the property, and therefore justifies a judgment against him.¹ An undertaking in replevin having more than the statutory requirements is so far invalid, and if taken by a public officer is void as having been taken *colore officii*, although the officer may not have designed to violate the law. The officer is the agent of the law and not of a party to the suit, and must know and act within his authority.²

§ 1293. **Disability of one surety does not release the co-obligors on the replevin bond.** The bond was voluntarily given, and to allow the obligors who were *sui juris* to set up the disability (minority) of a co-obligor to defeat it, would be to allow them to take advantage of their own wrong, and plaintiff in replevin or his sureties cannot defend on the ground of defects in the replevin writ.³ The obligor of a bond in replevin cannot avoid his liability by showing that he was induced to execute the bond by the fraud of one of his co-obligors, in which the obligee had no participation whatever, as where one of the co-obligor's names was a forgery.⁴ It is no defense to the sureties that their co-obligee, the plaintiff in replevin, was a married woman, and had not capacity to sign the bond, and was not held thereon.⁵

¹ Fenn v. Harrington, 54 Miss. 733.

² Cook v. Freudenthal, 80 N. Y. 202. In this case defendant was under arrest in a replevin case for fraudulently putting the property beyond the reach of the officer, and gave the bond for his release, and the officer added to the statutory conditions a clause for the payment of any judgment awarded against him, instead of for the return of the property, as would have been proper.

³ Goodell v. Bates, 14 R. I. 65; Morse v. Hodsdon, 5 Mass. 314.

⁴ Bigelow v. Comegys, 5 Ohio St. 256. This is on the well settled rule that where one of two innocent persons must suffer loss by the fraud, or misconduct of a third person, he who first reposes the confidence and commits the first oversight, must bear the loss.

⁵ Coverdale v. Alexander, 82 Ind. 503.

CHAPTER XLIV.

PROPER PARTIES.

Section.	Section.
Who are proper parties to a suit on the replevin bond . 1294	bring the suit in his own name, on the proper aver- ments 1301
Suit by officer for use, etc. . 1295	How brought in cases de- pending upon particular facts—Illustrations . . 1302
Suit by use in name of sher- iff 1296	All parties interested may join in suit on bond . . 1303
An action on a replevin bond should be brought in name of real party damaged . 1297	Joint obligees should join in suit on bond 1304
A stranger cannot maintain an action 1298	Suit on bond may be brought in any court of competent jurisdiction . 1305
Statute of limitations to suit on bond 1299	Procedure in case of lost bond 1306
Right of assignee of judg- ment to sue on bond . . 1300	
A substituted plaintiff may	

§ 1294. Who are proper parties to a suit on the replevin bond is a question that is very simple so far as the defendants are concerned. The parties who signed the bond are all proper, and in the absence of a statutory provision necessary parties and none other are proper parties. But in regard to proper plaintiffs the practice of the courts has not been quite uniform; yet, on examination of the authorities it will be found that they are not so far apart as at first appears. The better and prevailing rule being that the party injured is the proper plaintiff in his own name. As the bond took the place of the property, and the plaintiff in the suit on the bond thereby lost his property, and the defendant gained it and is now withholding it, thus seeking to profit by an act which the court has adjudicated to be wrong,

the bond must respond,¹ and the court will not let any technical matter prevent a recovery. The suit on the bond is a new suit and may be brought in any court having jurisdiction.² (See Chap. XLI.) Where the bond is taken to the sheriff it is the usual practice for him to assign it to any one damaged, and let him bring suit in his own name. In the absence of such assignment the action must be brought by sheriff for use, etc.³ Suit by sheriff need not be in the name of his office; his individual name, with proper words of description, will be sufficient.⁴

§ 1295. **Suit by officer for use, etc.** A suit brought by a sheriff upon a replevin bond may, like any other suit by one having the legal right of action, as respects the defendant, be brought for the use of whatever person the sheriff chooses, and it is not necessary that the one for whose use the suit is brought should have any interest or connection otherwise with the subject of the suit.⁵ Where there has been no assignment of the bond or of the judgment in replevin, nor refusal or neglect by the sheriff to enforce the bond, an action can only be maintained thereon by the sheriff. It cannot be brought directly by the plaintiff in the execution, unless the sheriff refuse to bring the action.⁶ In a suit on a replevin bond brought by the coroner "for use," etc., the party named as one of the usees is in no sense a party to the suit, nor is his presence in the suit as a usee in any form at all essential to the protection of his equitable rights to a portion of the damages recoverable on the bond.⁷ In replevin against a sheriff for goods levied on by him under

¹ *Buel v. Davenport*, 1 Root (Conn.), 261; *Webster v. Price*, 1 Root, 56. Suit on the bond is the only remedy; trover will not lie. *Smith v. McGregor*, 10 Ohio St. 461.

² *Show v. Tobias*, 3 N. Y. 188.

³ *Gould v. Warner*, 3 Wend. 60.

⁴ *Caldwell v. West*, 1 Zab. (21 N. J.) 411.

⁵ *Atkins v. Moore*, 82 Ill. 240.

⁶ *Greer v. Howard*, 41 Ohio St. 591.

⁷ *Blatchford v. Boyden*, 13 Bradw. (Ill.) 378.

an execution, the bond is properly made to the coroner, and upon condition broken, that officer may sue thereon for the use of any person damaged, by the wrongful suing out of the writ, or by the failure of the plaintiff to return the property as awarded. And when the plaintiff in execution is also made defendant in replevin, and named as defendant in the replevin bond, he may be joined as one in use with the sheriff; but the right to enforce the entire liability being in the sheriff, the plaintiff in execution being joined as defendant in the replevin suit, or as a usee in the suit on the bond, can in no way affect the sheriff's right of recovery, or add to the liability of the obligors in the bond, and hence describing such plaintiff in execution as the assignee of a wrong person will not defeat a recovery or afford ground to exclude the bond.¹

§ 1296. **Suit by usee in name of sheriff** is wholly under the control of the real party in interest bringing the suit. In an action on an undertaking in replevin given to a sheriff in his individual name, but put in suit by the real parties in interest, the sheriff has no authority, by a stipulation with one of the sureties, to dismiss such action as to such surety without the consent of the parties for whose benefit the undertaking was given. A dismissal under such circumstances is not a bar to a subsequent action on the undertaking prosecuted by the real parties in interest.² When the conditions of the replevin bond are broken, any person injured may sue in the name of the sheriff to his own use.³ These cases arise under a law providing that the bond shall be taken in name of the officer, and suit for damage shall be prosecuted in his name, or in name of one to whom he has assigned it, where the statute provides for such an assignment.

§ 1297. **An action on a replevin bond should be brought**

¹ Blatchford v. Boyden, 122 Ill. 657 (13 N. E. 801).

² Norton v. Lawrence, 39 Kan. 458 (18 P. 526).

³ Hanchett v. Buckley, 27 Ill. App. 159; Atkin v. Moore, 82 Ill. 240.

in the name of the real party damaged. The sheriff has no interest in it and should not be joined as plaintiff.¹ The assignee of a replevin bond, taken to the coroner and assigned by him, may sue in his own name.² The principal in a replevin bond need not be the plaintiff in the action but may be a third party, and if the bond be forfeited a judgment rendered against such third person as principal is not erroneous.³ A suit for special damage to one of several named in a replevin bond should be brought on the relation of the person on whom the damage fell.⁴ The better way in the absence of a statutory provision is for the action to be brought in the name of the party claiming to be damaged in all cases.

§ 1298. **A stranger cannot maintain an action** upon a replevin bond given in a proceeding to which he was not a party and where he is not an obligee in the bond.⁵

§ 1299. **Limitations to suit on bond.** The action on bond in replevin is barred by time the same as any other form of action. The statute commences to run with the date of judgment for a return; a mere delay for a less time than the statute does not release the sureties.⁶

§ 1300. **Right of assignee of judgment to sue on bond.** Where a judgment in replevin is assigned to a third party for a legal consideration, as the payment of a debt, the assignee becomes the real party in interest, and may bring suit on the replevin bond to enforce the judgment in his own name.⁷

¹ *McBeth v. Van Sickle*, 6 Nev. 134; *Curriac v. Packard*, 29 Cal. 199; *Lomme v. Sweeney*, 1 Mont. 584.

² *Acker v. Finn*, 5 Hill (N. Y.), 293; *City Council v. Price*, 1 McCord (S. C.), 299.

³ *Frei v. Vogel*, 40 Mo. 149.

⁴ *Commonwealth v. Kelly*, 2 B. Mon. (Ky.) 459.

⁵ *Pipher v. Johnson*, 108 Ind. 401 (9 N. E. 376.)

⁶ See *Hagan v. Lucas*, 10 Peters (U. S.), 400; *Lovejoy v. Bright*, 8 Blackf. 206; *Evans v. King*, 7 Mo. 411; *McRea v. McLean*, 3 Port. (Ala.) 138; *Lockwood v. Perry*, 9 Met. 444; *Burkle v. Luce*, 1 Comst. (N. Y.) 163.

⁷ *Schlieman v. Bowlin*, 36 Minn. 198 (30 N. W. 879). See also 2 Jones

§ 1301. **A substituted plaintiff may bring the suit in his own name on the proper averments.** Where the plaintiff, in an action for the claim and delivery of personal property, died after the execution of an undertaking to him by the defendant for the purpose of regaining possession of the property, and before the trial, and another person was substituted in his place as plaintiff, *held*, that the substituted person was the party entitled to recover, and as such the undertaking took effect in his favor as the plaintiff entitled to a return of the property.¹

§ 1302. **How brought in cases depending upon particular facts—Illustrations.** Where a replevin bond is made payable to an administrator individually, and he sues on it in his own name, but alleges that the action is brought for the benefit of the estate, and in an amended petition sets forth his representative capacity, judgment may be rendered in his name.² Where the undertaking in replevin is given to the sheriff alone, the plaintiff in execution is properly joined with the sheriff as plaintiffs in a suit thereon.³ If one of two obligees in a replevin bond is insolvent, and an assignee is chosen subsequently to the taking of the bond, an action upon the bond must be brought in the name of the other obligee alone.⁴ Upon a replevin bond for rent in Mississippi, the landlord cannot move for judgment in his own name without an assignment of the bond from the sheriff. Such motion can be made only in the name of the sheriff, his assignee, or successor in office.⁵

on Mortgages, § 1377; *Bolen v. Crosby*, 49 N. Y. 187; *Hurt v. Wilson*, 38 Cal. 263; *Ullmann v. Kline*, 87 Ill. 268; *Bennett v. McGrade*, 15 Minn. 132.

¹ *Emerson v. Booth*, 51 Barb. (N. Y.) 40. In regard to change of defendants in the replevin suit, by substitution, see *Williams v. St. Louis*, I. M. & S. Ry. 8 Mo. App. 135.

² *Oliver v. Townsend*, 16 Iowa, 430.

³ *Walls v. Johnson*, 16 Ind. 374.

⁴ *Brown v. Brigham*, 5 Allen (Mass.), 582.

⁵ *Lazarus v. Tribble*, 9 Miss. (1 Sneed & M.) 575.

§ 1303. All parties interested may join in suit on bond.

Where executions in favor of five different creditors were at the same time placed in the hands of a sheriff, and levied upon the same goods which were taken in replevin by a third party, and on trial judgment rendered in favor of the sheriff for a return, and the sheriff assigned the undertaking in replevin to the five execution creditors, *held*, that they could bring a joint action thereon.¹ Holders of separate judgments, whose executions have been levied on personal property which has been taken from the sheriff by replevin, may unite as plaintiffs in a suit for breach of the replevin bond, and the assignee of one of the judgments, the assignment of which is technically defective, is a real party in interest as plaintiff.² All parties interested may join in an action on the bond.³

§ 1304. Joint obligors should join. Where the undertaking was given to the plaintiff in execution and the sheriff jointly, and the plaintiff in execution alone brought suit thereon, *held*, that if this was a defect of parties it was waived by failure of defendant to demur on that ground.⁴

§ 1305. Suit on bond may be brought in any court of competent jurisdiction. When the plaintiff in detinue, or in a statutory action for the recovery of personal property in specie, commenced in the District Court of the United States, obtains possession of the property by executing the necessary statutory bond, and afterward suffers a voluntary nonsuit, the defendant may sue on the bond in a state court, and is not compelled to sue in a federal court.⁵ A contrary rule was laid down in Missouri, where suit was brought on a rereplevin bond in a different court but in the same county the

¹ Kaufman v. Wessel, 14 Neb. 161 (15 N. W. 219).

² Thomas v. Irwin, 90 Ind. 557; Moore v. Jackson, 85 Ind. 360; Walls v. Johnson, 16 Ind. 374; Toles v. Adey, 84 N. Y. 222.

³ Rutledge v. Corbin, 10 O. St. 478; Tate v. O. & M. R. R. 10 Ind. 174; Goodnight v. Goor, 30 Ind. 418; Bliss on Code Pleading, § 75.

⁴ Foster v. Bringham, 99 Ind. 505.

⁵ Wood v. Coman, 56 Ala. 283.

replevin suit was brought in.¹ This was on the ground that the action on the bond was but a continuance of the replevin action, and the court cited *Burtus v. McCarty*, 13 Johns. 424; *Davis v. Packard*, 6 Wend. 327. But it seems to the author that a suit on a replevin bond, especially when brought by the original defendant in replevin, is not a continuation of the original action, but a new and independent action, and like any other action can be commenced in the forum desired by plaintiff.

§ 1306. **Procedure in case of lost bond.** In a proceeding by motion to have execution against a surety on a lost replevin bond, the plaintiff must show by proof the former existence of the bond, substantially its contents, its loss, and that the surety was not released.² It cannot be substituted by a copy except on leave of court. Where the bond is lost a substituted bond occupies the same position as the lost one. Where the statute requires the clerk to endorse *forfeited* on the bond, if the property be not delivered or judgment paid as called for by it, and the bond then is a lien, the same as a judgment, running for ten years, which was not done because the bond was lost, when more than four years after, suit was brought to substitute the bond, and the sureties pleaded the statute which barred a simple contract in four years, *held*, a good defense.³

¹ *McDermott v. Doyle*, 11 Mo. 443.

² *Farrow v. Orear*, 2 Duv. (Ky.) 261.

³ *Poland v. Henry*, 64 Tex. 542. See *Austin v. Townes*, 10 Tex. 24; *Burton v. Miller*, 14 Tex. 299.

CHAPTER XLV.

LIABILITY OF PRINCIPAL AND LIABILITY AND RIGHTS OF SURETIES ON THE BOND.

	Section.		Section.
Liability of principal	1307	ties will not be enlarged by the courts	1318
How courts regard the liability of sureties to replevin bonds	1308	The liability is fixed by law and cannot be changed or released without the consent of the obligee	1319
Sureties' liability can not be greater than the principal's	1309	The liability of the surety must be determined by the law in force at the time it was assumed	1320
A release to the principal will discharge the sureties	1310	The sureties' obligation only covers the default of their principal when the suit takes its ordinary legal course, and he is cast in the replevin action	1321
There must be judgment against the principal	1311	It is no breach where the liability arises after the successful termination of the suit	1322
The waiver of judgment for return and taking a money judgment releases the sureties	1312	Subsequent surrender of the property by the officer to whom it is returned—releases	1323
The sureties cannot contradict or question the judgment against their principal	1313	Where the property pending the litigation is taken and disposed of legally, it releases the sureties	1324
Sureties are bound by the judgment rendered in the replevin action	1314	Value at date of trial, and damages the extent of their liability	1325
Judgment by confession or by agreement for a less amount than that claimed, if in good faith, is binding on the sureties	1315	The sureties are not liable for damages which accrued prior to the judgment for a return	1326
Sureties are not bound by a judgment rendered by collusion or fraud	1316		
Judgment may be entered in the replevin action against the sureties only where the statute so provides	1317		
The obligations of the sure-			

	Section.		Section.
Effect of a compromise with a part of the sureties . . .	1327	A legal change of defendants does not release the sure- ties	1332
Judgment in favor of the plaintiff on first trial as to all, and defeat as to one, defendant on retrial does not release the sureties . .	1328	Effect of agreement to delay, or neglect to enforce claim on bond	1333
But sureties will not be re- leased on any frivolous pretext—Illustrations . .	1329	A discharge in bankruptcy is no defense	1334
Sureties cannot contradict the recitals of their bond .	1330	Voluntary payment by surety cannot be recovered back from principal . . .	1335
Change in character in which plaintiffs sue, and addition of other plaintiffs will not release the sureties . . .	1331	Contribution and subroga- tion	1336
		If surety pay the judgment they are entitled to the property	1337

§ 1307. **Liability of principal.** The existence of a replevin bond does not preclude the defendant in replevin from resorting to other remedies against the plaintiff, if the latter wrongfully retains the goods taken on the writ.¹ He is liable without regard to the bond and may be made to answer in any proper remedy, the same as for any other wrong. If he sign the bond, he thereby creates a new obligation, and a plaintiff in replevin, who joins in the undertaking to prosecute the action and restore the property delivered to him, in case of a judgment to that effect is bound by the terms of the instrument to the same extent as any other obligor.² But this new obligation does not protect him or lessen his liability in any other form of action to enforce his obligation independent of the bond. A plaintiff in replevin who gets the property is bound to prosecute the action to final judgment, pay the costs and return the property, if such is the judgment of the court.³ Extent of the liability of the principal obligor in a replevin bond, determined in cases depending upon particular facts.⁴

¹ *Scott v. Scott*, 50 Mich. 372 (15 N. W. 515).

² *Buck v. Lewis*, 9 Minn. 314.

³ *Kayser v. Bauer*, 5 Kan. 202.

⁴ *Kercheval v. Harley*, 1 Meigs. (Tenn.) 412; *Case v. Rebelin*, 1 J. J.

§ 1308. **How courts regard the liability of sureties to replevin bonds.** Although the principal in a replevin bond is regarded as having no equities as against his opponent after a final decision in the case, still where he acted in good faith under an honest belief of a right, it will be considered in a suit on the bond. As the question then is who shall suffer of two innocent parties, the sureties or the defendant in replevin, they are regarded as standing on an equal footing and the finding will be in favor of the one having the better equity under all the facts. If the possession of the claimant be wrongful in the popular acceptance of the term, if it be inequitable and unconscientious, acquired for instance in violation of a trust, or by force, violence, or fraud, he should, *in all events*, be responsible for the value of the property. But if he held by title acquired in good faith, if his claim be not destitute of equity, or have probable foundation in law, if it be conscientious, he cannot be treated as a willful wrongdoer, not relievable even as against the act of Divine Providence. In short, his responsibility must depend upon the peculiar circumstances of the particular case. Therefore, one who gave bond for the delivery of a slave to which he believed he had a right is relieved from liability by the emancipation of the slave pending the suit.¹

§ 1309. **Sureties' liability cannot be greater than the principal's.** In debt on a replevin bond against the principal and surety, the surety made default, the principal pleaded an absolute release and obtained judgment. *Held*, that the plaintiff could not have damages assessed against the surety.²

§ 1310. **A release to the principal will discharge the sureties.** An absolute release "of all demands whatever," executed by the plaintiff to the principal obligor of a replevin

Marsh (Ky.), 29; Moore v. Campbell, 36 Vt. 361; Ladd v. Prentice, 14 Conn. 109.

¹ Pait v. McCutchen, 43 Tex. 291; Porter v. Miller, 7 Tex. 479. See Carpenter v. Stevens, 12 Wend. 589; Parsons on Contracts III, 217.

² Thomas v. Wilson, 6 Blackf. (Ind.) 203.

bond on which the suit was brought is a discharge of the bond.¹ A replevin bond is discharged by the rendition and discharge of a judgment in the replevin suit, on a verdict for the defendant that "defendant recover his costs."² Stipulation for dismissal without judgment releases the sureties upon the replevin bond.³ Where the plaintiff replevied property and the issue was property in defendant and others and verdict in favor of defendant generally, and he brought suit on the replevin bond, obtained judgment, and then settled with the plaintiff in replevin, and the other parties, who were alleged to be part owners, attempted to collect on the bond, they were perpetually enjoined.⁴

§ 1311. **There must be a judgment against their principal.** The sureties on a replevin bond are not liable until there has been a finding and judgment in the replevin suit against their principal.⁵ Where plaintiff in replevin fails to prosecute his action, defendant should have his damages assessed and an order for the return of the property, to put himself in position to sue on the bond.⁶ Where defendant in replevin took judgment and execution for his costs without praying a return, which execution was satisfied, when he brought suit on the replevin bond for the value of the goods, *held*, that the action could not be maintained.⁷ The sureties on a replevin bond are not liable unless there is a judgment of return; a mere money judgment, as in an action for damages against their principal, does not make them liable.⁸ A judgment which does not award a return does not impose any liability upon the sureties.⁹ No damages for a non-

¹ Thomas v. Wilson, 6 Blackf. (Ind.) 203.

² Chambers v. Waters, 7 Cal. 390.

³ Casper v. Kent Circuit Judge, 45 Mich. 251 (7 N. W. 816).

⁴ Edwards v. McCurdy, 13 Ill. 496.

⁵ Scott v. Elliott, 63 N. C. 215.

⁶ Clark v. Morton, 6 Minn. 412.

⁷ Pettygrove v. Hoyt, 11 Me. (2 Fairf.) 66.

⁸ Jaggard v. The L. & G. Mfg. Co., 8 Dalys. 251; Gallarati v. Orser, 27 N. Y. 324.

⁹ Mitchum v. Stanton, 49 Cal. 302.

return are recoverable on a replevin bond unless there has been a judgment for a return.¹

§ 1312. **The waiver of judgment for return and taking a money judgment releases the sureties.** A replevin bond, in replevin of attached property, is not a security for the debt sued on, but is a security for the forthcoming of the very property levied on or its value.² If the very property be abandoned by the plaintiff, if he take no judgment of foreclosure upon it but a personal money judgment only, then the sureties are released. It is not like taking a nonsuit as to an ordinary surety, which may be followed up by a new suit. It is a clear abandonment of the cause of action as against the obligors on the replevin bond. The liability of the obligors does not arise until after judgment against the debtor. They did not stand good for the debt but for the property, and as the judgment ignores the property, there is nothing in the judgment for them to respond to. It is also necessary to show that the debt cannot be made out of the principal before the sureties can be made to respond. Of course this is only in cases where a return is possible, and does not apply to cases where return cannot be had, and in North Carolina a different rule has been laid down. The court say that an agreement to dispense with a return and take a money judgment is binding on the sureties, but the first is the better rule.³

§ 1313. **The sureties cannot contradict or question the judgment against their principal.** That judgment is conclusive upon all parties, so far as the issues involved are concerned. But it must be a judgment regularly obtained upon the issues involved in replevin. Where other issues are involved they are not bound by the result. Thus, where \$44 due on an account between plaintiff and defendant was included in the judgment for the value of the replevied prop-

¹ Wright v. Marvin, 59 Vt. 437 (9 A. 601).

² Toland v. Swearingen, 39 Tex. 447.

³ Council v. Averett, 90 N. C. 168; Robbins v. Killebrew, 95 N. C. 19.

erty, the sureties are not bound and may assail the judgment on this point. For them it is a defense *pro tanto*.¹ During the pendency of a replevin suit, the sureties to the replevin bond are treated as in court; and not objecting, they are concluded by a judgment to which the principal consents,² and such a law is constitutional.³ But where the attorneys had stipulated that judgment should be entered for the value, and not for a return, it was *held* that the sureties were not concluded by such a judgment, but could show that the property was where it could be delivered.⁴ The sureties have a right to insist that the judgment be in the alternative for a return of the property, but if they fail to appear and exert this right, they are concluded by the judgment, though not in strict accord with the statute.⁵ An action can be maintained against the sureties where judgment has been rendered against their principal in the replevin suit, simply for the recovery of the possession and not in the alternative for the recovery or the value. This judgment cannot be questioned collaterally.⁶

§ 1314. **Sureties are bound by the judgment rendered in the replevin action.** Where defendant, in an action of replevin, gave a redelivery bond and kept the property and was finally defeated in the action, the sureties on this bond in the absence of collusion, or fraud are bound by the judgment against defendant in the replevin suit.⁷ The sureties are bound by all steps their principal may take in good faith in the action and by the final result, and if the court have jurisdiction

¹ Lee v. Hastings, 13 Neb. 508 (14 N. W. 476).

² Wells v. Griffin, 2 Head. (Tenn.) 568.

³ Pratt v. Donovan, 10 Wis. 378.

⁴ Lee v. Hastings, 13 Neb. 508 (14 N. W. 476).

⁵ Dorrington v. Meyer, 8 Neb. 211.

⁶ Marix v. Franke, 9 Kan. 132; Whitney v. Lehmer, 26 Ind. 503. See also as sustaining these views, Hall v. Smith, 10 Iowa, 45; Hawley v. Warner, 12 Iowa, 42; Mason v. Richards, 12 Iowa, 72; Koffer v. Harlow, 5 Allen, 348; and as not endorsing this view, see Nickerson v. Chatterton, 7 Cal. 568; Chary v. Roland, 24 Cal. 147.

⁷ Kennedy v. Brown, 21 Kan. 171.

they are bound by the order made at the final hearing.¹ The amount of the judgment recovered by defendant is conclusive in a subsequent suit upon the replevin bond.² And nothing short of the full and complete satisfaction of this judgment will release them and satisfy the terms of the bond.³ In *detinue*, or the statutory action in the nature thereof, if the plaintiff has obtained the possession of the property at the commencement thereof, and afterward dismisses his suit, it is the duty of the court to have the alternate value of the property assessed by the jury, with the value of the hire or use thereof, and to render judgment against him for the same; but the rendition of this judgment is not necessary to authorize or sustain a common law action on the replevin bond under which plaintiff acquired the possession of the property.⁴ And in such a case ownership of the property cannot be shown in bar of the suit on the bond though it has been permitted in mitigation of damages.⁵ A judgment in *detinue* on the merits is conclusive as to the ownership of the property in a subsequent action on the replevin bond.⁶

§ 1315. **Judgment by confession or by agreement for a less amount than that claimed, if in good faith, is binding on the sureties.** The sureties in a claim property bond, given by defendant in replevin for the retention of the property pending the suit, are not released from liability by the fact that, on the trial of the replevin suit, the defendant confessed judgment in favor of the plaintiff without the knowledge of said sureties, no fraud or collusion being shown in such confession. If, however, the sum confessed included other matters, so far it would be a defense, and that question

¹ *Pirkins v. Rudolph*, 36 Ill. 310; *Burrall v. Vanderbilt*, 1 Bos. (N. Y.) 637.

² *Contril v. Babcock*, 11 Col. 143 (18 P. 342).

³ *Hicks v. McBride*, 3 Phil. (Pa.) 377.

⁴ *Ernst Bros. v. Hogue*, 86 Ala. 502 (5 So. 738).

⁵ *Savage v. Gunter*, 32 Ala. 467.

⁶ *Ernst Bros. v. Hogue*, 86 Ala. 502 (5 So. 738).

should be left to the jury.¹ But where the case is regularly tried and a verdict rendered by a jury, but the judgment by consent of the parties to the suit is entered for the amount of a lien instead of for the property, as contemplated by the jury, the sureties are bound by the judgment.²

§ 1316. **Sureties are not bound by a judgment rendered by collusion or fraud.** While sureties on a replevin bond are concluded by a regular judgment against their principal,³ they are not bound by a secret confession of judgment, fraudulently and collusively made between their principal and the obligee, and they may enjoin the prosecution of a suit on the bond where their principal, without their knowledge, has stipulated that the defendant may take judgment.⁴ Where attached property was replevied by plaintiff and bond given, and plaintiff and defendant afterward agreed that the attachment should stand, *held*, that the sureties on the replevin bond should be allowed to intervene and defeat the attachment suit and sustain the replevin suit if they could.⁵

§ 1317. **Judgment may be entered in the replevin action against the sureties** in some jurisdictions; but this is not the general rule, and where done is by virtue of an express statute. Several states, after trying that plan, abolished it by statute. It is not deemed necessary to enter into a further discussion of such proceeding.⁶ The code of Iowa provides, §§ 3229-3242, that a judgment for money against the plaintiff shall be against the sureties on the bond, and this

¹ *Bradford v. Frederick*, 101 Pa. 445; *Lee v. Hastings*, 13 Neb. 508 (14 N. W. 476).

² *Estey v. Harmon*, 40 Mich. 645.

³ *Williams v. Vail*, 9 Mich. 162; *Lothrop v. Southworth*, 5 Mich. 436; *Hirshler v. Reynolds*, 22 Iowa, 152.

⁴ *Wright v. Hoke*, 38 Mich. 525; *King v. Baldwin*, 17 Johns. (N. Y.) 384; *Viel v. Hoag*, 24 Vt. 46.

⁵ *Burch v. Watts*, 37 Tex. 135.

⁶ *Pratt v. Donovan*, 14 Wis. 378; *Klœty v. Dilles*, 45 Wis. 485; *Clerk's Office v. Hufstetter*, 67 N. C. 449; *Boylston v. Davis*, 74 N. C. 78; *Har-ker v. Arundell*, 74 N. C. 85.

has been held to authorize a judgment against the sureties upon the disposition of the case, without requiring them to be brought into court by formal proceedings.¹ Double damages may be assessed against the sureties on the bond, where the statute under which it is given provides for it.²

§ 1318. **The obligation of the sureties will not be enlarged by the courts.** The liability of the surety depends upon the bond, but the plaintiff in replevin is liable without reference to the conditions of the bond.³ The sureties are liable only to the extent they are made so by law, and this liability cannot be increased by stipulation of attorneys without the sureties' consent.⁴ The undertaking of a surety in replevin is to be construed strictly and is not to be enlarged by the courts.⁵ The liability of the obligors in a replevin bond is, in case of failing to restore the property if ordered to do so, to pay the damages assessed in the action of replevin and costs, but this does not include attorney's fees.⁶ Where one of the conditions of the bond is that the property will be returned "if a return be adjudged by the court," the sureties are not liable for the property unless there is a judgment for a return; a verdict is not sufficient.⁷ A judgment, by agreement dispensing with the provision for a return of the property, releases the surety on the bond so far as the value of the property replevied.⁸ The California courts have carried this doctrine to the extreme, and declared that where

¹ McIntire v. Eastman, 76 Iowa, 455 (41 N. W. 162); Hershler v. Reynolds, 22 Iowa, 154.

² Brannin v. Bremen, 2 N. M. 40.

³ Creamer v. Ford, 1 Heis. (Tenn.) 307.

⁴ Lee v. Hastings, 13 Neb. 508 (14 N. W. 476).

⁵ Vinyard v. Barnes, 124 Ill. 346 (16 N. E. 254).

⁶ Kenley v. Com. for Henderson, 6 B. M. 583.

⁷ Thomas v. Irwin, 90 Ind. 557; Chambers v. Waters, 7 Cal. 390; Mills v. Gleason, 21 Cal. 274; Clary v. Roland, 24 Cal. 148; Nickerson v. California Stage Co., 10 Cal. 521; Clark v. Norton, 6 Minn. 412; Ladd v. Prentice, 14 Conn. 109; Badlam v. Tucker, 1 Pick. 284; Cooper v. Brown, 7 Dana (Ky.), 333; Ashley v. Peterson, 25 Wis. 621; Hollensbee v. Ritchey, 49 Ind. 261; Pipher v. Johnson, 108 Ind. 401 (9 N. E. 376).

⁸ Gallarati v. Orser, 27 N. Y. 324.

the bond contains the provision, if a return be awarded by the court, it will not extend to an award of a return by any other court than that in which the bond was given.¹ The liability of sureties on a replevin bond is determined by statute, and the fact that circumstances render a judgment against their principal impossible, where that is a statutory prerequisite to suit on the bond, cannot enlarge their liability.² Where plaintiff took the property, and on trial verdict was rendered for a return of the replevied property, or for its value as assessed, but the clerk erroneously entered an absolute money judgment, the surety successfully defended suit on his bond on the ground that this judgment enlarged his liability.³ Where the original debtor died, after property was attached and replevied, but before judgment was rendered in the suit, *held*, in action by the creditor on the replevin bond, that the lien created by such attachment was, by such debtor's death, dissolved, and that the creditor could not recover.⁴

§ 1319. **The liability is fixed by law and cannot be changed or released without the consent of the obligee.** One who signs a replevin bond assumes all the liability the law gives to such a bond, and can by no personal arrangement with the party for whom he signs limit or affect such liability. The bond is a protection to the adverse party, and he alone can release or relieve the surety.⁵ The sureties are only liable for the value of the goods and costs.⁶

§ 1320. **The liability of the surety must be deter-**

¹ *Mitchum v. Stanton*, 49 Cal. 302.

² *Scott v. Scott*, 50 Mich. 372 (15 N. W. 515).

³ *Berthold v. Fox*, 21 Minn. 51.

⁴ *Green v. Baker*, 14 Conn. 432.

⁵ *Hogg v. Green*, 17 Kan. 327. Here the surety took security when he signed the bond. His principal was successful, and after the statutory time had expired without appeal being taken, with bond, he surrendered his security, notifying the parties. The parties afterwards consented that appeal be taken, and his principal was defeated on appeal. I think no court has gone further to charge the surety.

⁶ *Taylor's Landlord and Tenant*, § 745.

mined by the law in force at the time it was assumed. And where judgment is obtained against him and sale of his property is necessary to satisfy the judgment, the property must be taken and sold under the law in force as it then was. His only connection with the case is by the bond, and the bond takes effect from its date, and the law in force at that time is the law by which his liability is measured and determined.¹

§ 1321. The sureties' obligation only covers the default of their principal when the suit takes its ordinary legal course and he is cast in the replevin action. Where plaintiff in replevin, whose property had been attached, entered into an agreement with defendant (plaintiff in attachment) that the attachment should stand, *held*, that the obligation of the sureties on the replevin bond were only bound for the forthcoming of the property attached, if the proceedings in the attachment were regular and proper and the property levied on subject to the attachment, and this agreement did not bind them or prevent their making any defense their principal could.² The liability of a defendant, upon a bond executed to the plaintiff "to perform the judgment of the court in the action," extends only to such judgment as the court may render on the claim for possession of the property sued for.³ The sureties may in all cases stand upon the exact terms of their contract.⁴ Both principal and surety are discharged by an unconditional reference of a replevin suit to arbitrators, but not by a reference which provides that the finding of the arbitrators shall have the force and effect of a verdict, and that judgment shall be entered thereon.⁵ A replevin bond is for the special purpose of protect-

¹ Stockwell v. Kemp, 4 McLea (C. Ct.), 80.

² Burch v. Watts, 37 Tex. 135.

³ McKee v. Pope, 18 B. Mon. (Ky.) 548.

⁴ Fullerton v. Miller, 22 Md. 5; Tarpey v. Shillenberger, 10 Cal. 390; Clary v. Rolland, 24 Cal. 147; Clark v. Norton, 6 Minn. 412.

⁵ Perego v. Grimes, 2 Col. 651; Perkins v. Rudolph, 36 Ill. 306; Archer v. Hale, 4 Bing. 464. See Moore v. Bowmaker, 6 Taunt. 379; Aldridge

ing the obligee or his assignee in the suit in which it is given, and no action can be brought thereon for damage determined in a subsequent suit between the same parties about the same property.¹ A settlement may or may not bind them according to circumstances. If not bound by the settlement they may sometimes be *held* on the failure to prosecute diligently or to effect.²

§ 1322. **It is no breach where the liability arises after the successful termination of the suit.** The conditions of the forthcoming bond are only broken by a failure in the suit and a failure to perform the judgment rendered. Where a plaintiff seized property in replevin to enforce a lien, and on trial his lien was upheld and judgment in his favor, and defendant then tendered the amount of the lien and demanded a return of the property which plaintiff refused to return, *held*, that the sureties on his bond were not liable, that this was not a breach of the bond.³ Where a party, claiming to be the owner of a chattel in the possession of another, replevies the same, but on trial his interest is adjudged to be that of a mortgagee only, but entitled to possession, the surety upon his replevin bond is discharged from liability thereon.⁴ The bond is not liable for a penalty incurred in another suit or proceeding.⁵

§ 1323. **Subsequent surrender of the property by the officer to whom it is returned.** A subsequent surrender of the property by the constable under a claim of exemption does not affect the rights of the surety on the replevin bond.

v. Harper, 10 Bing. 118; *Coleman v. Wade*, 2 Seld. (N. Y.) 44; *Bowman v. Moore*, 1 Exch. 355; *Leighton v. Brown*, 98 Mass. 516; *Eldred v. Bennett*, 33 Pa. St. 183.

¹ *Boyer v. Fowler*, 1 Wash. 101.

² *Harrison v. Wilkin*, 69 N. Y. 413; *Coleman v. Wade*, 2 Seld. (N. Y.) 44; *Hallett v. Mountstephen*, 2 Dow. & Ry. 343.

³ *Jacobs v. Nathan*, 83 Ala. 271 (3 So. 607).

⁴ *Edwards v. Cottrell*, 43 Iowa, 194. See *Pettygrove v. Hoyt*, 11 Me. 66; *Clark v. Norton*, 6 Minn. 413; *Mitchum v. Stanton*, 49 Cal. 304; *Collins v. Hough*, 26 Mo. 150; *Bolsley v. Hoffman*, 13 Pa. St. 606.

⁵ *Boyer v. Fowler*, 1 Wash. Ter. 119.

His obligation is satisfied when the property is returned to the proper party, and he cannot be held responsible for the use made of it after its return.¹

§ 1324. **Where the property pending the litigation is taken and disposed of legally, it releases the sureties from the obligation to return it.** The sureties in an undertaking in replevin are released from their obligation to return the property if it is taken by due process of law without their fault, and held or sold, so that a return is rendered impossible.² The theory of these cases is that the property being in the custody and control of the court, it has ordered or allowed it to be so disposed of that a return is impossible. The status of the property is thus settled in favor of the obligors on the bond, just as much as if there had been judgment in the replevin action in favor of their principal.

§ 1325. **Value at date of trial and damages the extent of their liability.** The obligors on a forthcoming bond in replevin are only liable for the value of the property at the date of the trial, and damages of detention, which value must be shown by legal evidence.³ Sureties on a replevin bond are bound only for the value of the property not forthcoming on demand and within the penalty of the bond.⁴

§ 1326. **The sureties are not liable for damages which accrued prior to the judgment for a return unless they are included in the judgment rendered against their principal.**⁵ The same principles govern as in the case of other bonds.⁶

¹ Richards v. Rape, 3 Bradw. (Ill.) 24.

² Caldwell v. Gans, 1 Mont. 570; Hogan v. Lucas, 10 Pet. 400; Hunt v. Robinson, 11 Cal. 262; Buckle v. Luce, 1 Comst. 171; Lockwood v. Perry, 9 Metc. 444; McRea v. McLean, 3 Porter, 138; Evans v. King, 7 Mo. 411; Ackerman v. King, 29 Tex. 291; Kercheval v. Harney, Meigs. (Tenn.) 403.

³ Schnaider v. Niederweiser, 28 Mo. App. 233.

⁴ Miles v. Davis, 36 Tex. 690; Keller v. Carr, (Ind.) 21 N. E. 463.

⁵ Sopris v. Lilley, 2 Cal. 498; Kenley v. Commonwealth, 6 B. Mon. (Ky.) 583.

⁶ Wolfe v. McClure, 79 Ill. 564.

§ 1327. **Effect of a compromise with a part of the sureties.** Plaintiff compromised with four sureties for less than their liability, and deducted from the amount claimed for damage against the others the amount paid by those settled with. *Held*, that the remainder is recoverable from one of the other sureties to the extent of his liability.¹ Where plaintiff sued two defendants in replevin jointly, and they gave a joint bond with sureties and retained the property, and plaintiff dismissed as to one but recovered judgment as to the other, *held*, that this dismissal released the sureties on the bond.² Where a replevin bond is executed by several defendants, the entering of a *nol. pros.* as to any one will discharge the sureties on the bond.³ Where an undertaking in replevin is given in the joint behalf of two defendants, and one of them is discharged during the progress of the suit, the sureties are released.⁴

§ 1328. **Judgment in favor of the plaintiff on first trial as to all, and defeat as to one defendant on retrial, does not release the sureties.** The judgment in the replevin suit was against three defendants; it was affirmed as to two and a new trial granted as to the third; on such new trial a judgment was found in his favor; *Held*, that this did not discharge the sureties.⁵

§ 1329. **But sureties will not be released on any frivolous pretext.—Illustrations.** Where the sheriff took a replevin bond, and his term of office expiring the writ was returned unexecuted, and his successor executed an *alias* writ without taking a new bond, *held*, that an action could be

¹ *Cain v. Williams*, 16 Nev. 427. The question as to whether this release of the four sureties would not release the others, was not raised in the trial court, and the supreme court for this reason refused to consider it. The only question before the court was whether this defendant's liability should be lessened by the full amount of the liability of the other four, or by the amount paid by them in compromise of that liability.

² *Tyler v. Davis*, 63 Miss. 345.

³ *Harris v. Taylor*, 3 Sneed. (Tenn.) 536.

⁴ *Harris v. Taylor*, 3 Sneed. (Tenn.) 541.

⁵ *Goodwin v. Bunzl*, 102 N. Y. 22 (6 N. E. 399).

maintained on the bond after failure to comply with a judgment for a return.¹ If the plaintiff in replevin give a bond with surety to prosecute his suit without delay, and make return of the property if a return be adjudged by law, and the defendant retains the property, giving bond, and afterward arbitrators award no cause of action, the plaintiff's sureties are liable for costs on the replevin suit.² The defendant cannot be allowed to plead that the bond was for ease and favor and unconstitutional, or that the wrong court was mentioned.³ If the bond do not correctly recite the date of the commencement of the suit, it is immaterial.⁴ A plaintiff in replevin who avails himself of the benefit of the sureties by giving bond and obtaining the property, can not defeat his liability or the liability of the sureties because of some defect or irregularity in the proceedings.⁵ It has been held that a party cannot defeat his liability on the bond by showing the law unconstitutional⁶ or no jurisdiction in the court. The sureties on a replevin bond are liable for costs in the action, if awarded against their principal, and costs on appeal.⁷ When the bond has been given and the property taken, no defects not going to the substance of the contract will be permitted to excuse the makers, and a failure of the defend-

¹ *Petrie v. Fisher*, 43 Ill. 442.

² *Tibbal v. Cahoon*, 10 Watts (Pa.), 232.

³ *Arnold v. Allen*, 8 Mass. 149; *Weaver v. Field*, 1 Blackf. 335; *Parker v. Simonds*, 8 Met. 211; *Wolfe v. McClure*, 79 Ill. 564; *Gordon v. Jenney*, 16 Mass. 465.

⁴ *Graves v. Shoefelt*, 60 Ill. 464.

⁵ *Carlton v. Dixon*, 12 Or. 144 (6 P. 500); *Persse v. Watrous*, 30 Conn. 146; *Decker v. Anderson*, 39 Barb. 347; *Coleman v. Bean*, 14 Abb. Pr. 38; *Johnson v. Weatherwax*, 9 Kan. 75; *Franklin v. Pendleton*, 3 Sand. 573; *Decker v. Judson*, 16 N. Y. 442; *Todd v. Gordy*, 29 La. An. 498; *Wachstetter v. State*, 42 Ind. 168; *Nunn v. Goodlett*, 10 Ark. 99.

⁶ *McDermott v. Isbell*, 4 Cal. 113; *Magruder v. Marshall*, 1 Blackf. 333; *State v. Stark*, 75 Mo. 566.

⁷ *Carlton v. Dixon*, 14 Or. 293 (12 P. 394); *Tibbles v. O'Connor*, 28 Barb. 538; *Hinckley v. Kreitz*, 58 N. Y. 588; *Letson v. Dodge*, 61 Barb. 128; *Balsley v. Hoffman*, 13 Pa. St. 606; *Gainsford v. Griffith*, 1 Wms. Saund. 58, note 1; *Branscombe v. Scarborough*, 6 Ad. & E. (N. S.) 13.

ant to take advantage of such defects in the replevin suit prevents him from having his remedy on the bond.¹ They are estopped from showing that no suit in replevin was pending because no summons was issued.² Where the principal agreed to give time or to stay execution, such agreement did not avail to release the sureties unless the agreement created an absolute disability on the part of the payee to proceed.³ Where the sureties were objected to as provided by statute, but failed to justify, they are not relieved of their liability thereby.⁴ That the bond is for less than double the value of the property, does not release them. Defendant may waive such defects, and does waive them by suing on the bond.⁵ Where the signature of one of the sureties was a forgery the bond is not for that reason void as to the other surety; he may still be held.⁶

§ 1330. **Sureties cannot contradict the recitals of their bond.** Goods having been replevied in an action therefor against both the assignee and assignor, and bond given for a retention by the said assignee and assignor of the goods on judgment against the assignor alone for a return, the sureties cannot, in an action on the bond, show that the assignee had the sole possession, and they executed the undertaking only on his behalf, and to procure a return of the property to him.⁷ The obligors in a forthcoming bond in a replevin suit are estopped by the recitals of the bond from showing that the property therein alleged to be retained was never in their possession.⁸

§ 1331. **Change in character in which plaintiffs sue**

¹ *O'Grady v. Keyes*, 1 Allen (Mass.), 284.

² *Reeves v. Reeves*, 33 Mo. 28; *Sammons v. Newman*, 27 Ind. 508.

³ *Tousey v. Bishop*, 22 Iowa, 178.

⁴ *Van Duyne v. Coope*, 1 Hill, 557; *Decker v. Anderson*, 39 Barb. 347.

⁵ *Rodesbaugh v. Cady*, 1 West L. M. (Ohio), 599.

⁶ *Bigelow v. Comegys*, 5 Ohio St. 256.

⁷ *Auerbach v. Marks*, 10 Dalys. 171.

⁸ *Schnaider v. Niederweiser*, 28 Mo. App. 233; *Carpenter v. Stearns*, 32 Mo. App. 132.

and the addition of other plaintiffs will not release the sureties. A surety in a judicial proceeding must be considered as contracting with a view to what the law prescribes, and as assenting to all the lawful consequences of his act; and the sureties on a defendant's bond in replevin, for the retention of the property, must be considered as having contracted with reference to the law applicable to the trial and final determination of the case. Where the suit was brought by his principals as executors, and on the trial they were permitted to change their designation to heirs at law and add other heirs at law as co-plaintiffs, it does not release the surety.¹

§ 1332. **A legal change of defendants does not release the sureties.** Where an action of replevin was brought against the owner's agent, and the owner afterward substituted as the defendant by the court, the sureties on the replevin bond are not thereby released, but stand bound for the indemnity of the new party equally as if he had been the original and only defendant.² A contrary doctrine was followed in Tennessee.³ Where the assignee of a debtor brought replevin against an officer who had levied on the debtor's property, and died before the determination of the suit in replevin, which was revived in name of his successor as assignee, and judgment finally rendered for the sheriff, *held*, that this was no defense to the sureties and that they were liable for the judgment.⁴ A surety in a replevin bond may be discharged on the trial, and another person substituted in his place in order to render the surety competent as a witness for plaintiff.⁵

§ 1333. **Effect of agreement to delay or neglect to enforce claim on bond.** The sureties upon a replevin bond

¹ Jamieson v. Capron, 95 Pa. 15.

² Hanna v. International Petroleum Co., 23 Ohio St. 622.

³ Smith v. Roby, 6 Heis. (Tenn.) 546.

⁴ Greer v. Howard, 41 Ohio St. 591.

⁵ Amos v. Sinnott, 5 Ill. (4 Scam.) 440.

will not be discharged by an agreement to stay execution against their principal, made under such circumstances that equity would not enjoin an execution taken out in violation of the agreement.¹ Under the Kentucky statute of 1828, a surety in a replevin bond is discharged by a failure to sue out execution within twelve months after the bond falls due, notwithstanding the death of the principal.² Where sureties in a replevin bond agreed in writing that the execution might be stayed any length of time which the plaintiff might direct, and no time was fixed by the plaintiff, *held*, that after the lapse of time, from 1838 to 1851, without the plaintiff's suing out execution, the sureties were released.³

§ 1334. **A discharge in bankruptcy is no defense.** Where a defendant in an action of replevin has given a bond for the forthcoming of the property, and afterward became bankrupt and received his discharge in bankruptcy, judgment may be rendered against him for the restoration of the property, notwithstanding his discharge,⁴ and his discharge in bankruptcy does not release the surety on his replevin bond.⁵ Though the principal would be released by the discharge in bankruptcy, a directly contrary decision was announced by the Tennessee court,⁶ and it may be supported by many cogent reasons, but the law as laid down by the supreme court of the United States would be considered the better guide by most courts.

§ 1335. **Voluntary payment by surety cannot be recovered back from principal.** When a surety pays a debt he must be legally bound for it to enable him to recover it of his principal, and the principal must also at the same time be under a legal obligation to pay the debt. Where

¹ *Tousey v. Bishop*, 22 Iowa, 178.

² *Br wn v. Fulkerson*, 8 B. Mon. (Ky.) 393; *Band v. Patterson*, 2 B. Mon. (Ky.) 378.

³ *McCauley v. Offutt*, 12 B. Mon. (Ky.) 388.

⁴ *Robinson v. Soule*, 56 Miss. 549.

⁵ *Wolf v. Stix*, 99 U. S. 1.

⁶ *Choate v. Quinichett*, 12 Heis. 427.

a suit in replevin, after bond given and property taken, was settled by an agreement between the parties, the plaintiff agreeing to pay the defendant a certain sum, but where no judgment is rendered, if the surety on the replevin bond afterward, without the request of the plaintiff, pay the amount agreed to be paid to the defendant, he cannot recover the same of his principal, the payment being voluntary on the part of the surety.¹

§ 1336. **Contribution and subrogation.** Sureties on the replevin bond of an administrator may recover from the sureties on the administrator's bond the amount they have been compelled to pay by reason of the administrator not performing the judgment rendered against him in the replevin case.² Where sureties on a replevin bond pay the judgment against them and their principal, they have a right to have the judgment marked to their use, that they may have process upon it against their principal.³ A surety on the last replevin bond is not entitled to contribution from surety on the first.⁴ No equity or right of subrogation accrues to a surety in a replevin bond who has not paid the debt.⁵ A replevin bond is one of indemnity only, and a surety on such bond is entitled to be subrogated to all the rights of his principal and to avail himself of the same defenses—recoupment, for instance—which were open to the latter.⁶

§ 1337. **If sureties pay the judgment, they are entitled to the property.** The sureties in an undertaking in replevin must return the property after a judgment has been rendered for such return if it is in their power so to do, and

¹ Hallensbee v. Ritchey, 49 Ind. 261.

² State to use, &c., v. Dailey, 7 Mo. App. 548; Ranney v. Thomas, 45 Mo. 112.

³ Jennings v. Hare, 104 Pa. 489.

⁴ Brooks v. Shepherd, 4 Bibb. (Ky.) 572.

⁵ Glass v. Pullen, 6 Bush. (Ky.) 346.

⁶ Sildner v. Smith and wife, 40 Md. 602.

they are entitled to the property if they pay the judgment in the suit in which the property has been attached. The condition of a replevin bond, to return the property, is complied with if the sheriff acquire possession under a subsequent attachment or execution.¹

¹ *Caldwell v. Gans*, 1 Mont. 570; *Hunt v. Robinson*, 11 Cal. 272.

CHAPTER XLVI.

PROPER MEASURE OF RECOVERY IN SUIT ON BOND.

	Section.		Section.
The measure of damages should be compensation	1338	mortgaged, and not actually taken possession of	1347
The same—Illustrations	1339	Rule in replevin of attached property	1348
Loss from interruption of business should be recovered in the replevin action,	1340	Damages, how determined—Limit	1349
Vindictive and punitive damages are not recoverable	1341	Where part of the goods is returned injured	1350
In justice court the damages are not limited by the jurisdiction of the justice	1342	In case of distress	1351
Limit of damages recoverable—Illustrations	1343	Measure of damages, suit by one having special interest only	1352
The value found in the replevin suit with interest is a proper item of recovery on the bond	1344	In case of partners	1353
Interest on the value should be allowed	1345	As between mortgagee and mortgagor	1354
Where value not found in the replevin suit, actual value allowed	1346	Where only nominal damages will be allowed	1355
Measure where property attached to real estate and		Where suit dismissed	1356
		Rule of damages in suit on delivery bond	1357
		Costs of court and of re-taking the property and attorney's fees	1358
		Interest on the penalty of the bond may be allowed when needed	1359

§ 1338. The measure of damages in suit on the bond should be compensation. There is no reason for any other measure of damages, as the judgment comes out of the surety who, no matter how flagrant a wrongdoer the principal may have been, should not in good conscience be called upon to make the one he has wronged more than whole. By the common law the makers of the bond were liable for the

full amount of the penalty named, but even under the common law courts of chancery frequently interfered in case of oppression or hardships, and relieved the sureties from the full penalty, when it did not require that amount to compensate the wronged party.¹ And this is now the well settled rule in several states, made so by statute. But there are several different ways of accomplishing this result. In some states the practice is to enter judgment for the full penalty of the bond, and at the same time enter an order that it shall be satisfied on the payment of a less amount, which is fixed at the amount of damages plaintiff has sustained.² But the more general practice is to render judgment on the suit on the bond for just the amount the sureties are expected to pay, which should be full compensation to the wronged party, and to treat the sum named as the penalty of the bond, the same as it is treated in other statutory bonds, such as attachment and injunction, as a limit beyond which the sureties are not liable in any event, and not as a measure of the right of recovery. By the bond the plaintiff in replevin binds himself that if defeated he will restore the property in like good order and condition as when taken. Where the damages are assessed *nisi*, and the property is not returned, the defendant in a suit on the replevin bond is entitled to the value of the goods and interest from date of demand in addition to the damages and costs in the replevin suit and interest, and if the damages for the unlawful detention are not assessed in the replevin suit, the defendant may recover in an action on the replevin bond all damages sustained by such taking, which is ordinarily the value of the goods when taken with interest.³

¹ *Wyllie v. Wilkes*, Doug. (Eng.) 523. Sir Thomas Moore swore by the body of God that he would grant an injunction, unless the law judges were satisfied upon the payment of full compensatory damages.

² *Gould v. Warner*, 3 Wend. 54; *Odell v. Hole*, 25 Ill. 208; *Frazier v. Laughlin*, 1 Gilm. 347; *Hunter v. Sherman*, 2 Scam. 544; *Marsh v. Wright*, 14 Ill. 248; *Toles v. Cole*, 11 Ill. 562.

³ *Washington Ice Company v. Webster*, 62 Me. 341.

§ 1339. **The same—Illustrations.** Where grain taken on a writ of replevin was threshed and sold by the plaintiff, and upon the trial the ownership was found in the defendant, the measure of his recovery was held to be the market value of the grain at the time of the trial, less the cost of threshing and marketing, it not appearing that plaintiff had acted in bad faith in obtaining the writ.¹ Where a person, as a means of getting possession of lumber loaded on cars under a contract of sale without paying for it, brings a replevin suit against the vendor, which goes against him, and leaves the vendor to obtain payment by a suit on the replevin bond, the jury may give as damages the value of all the lumber on the cars though its amount was under-estimated in the replevin bond, and they may add interest on the value of the lumber during its detention.² If in a judgment for a return upon a replevin suit there be no assessment of damages occasioned by the detention, and if, upon the restitution writ, no return of the goods was obtained, the damage for the detention may be assessed and allowed in an action upon the replevin bond, and in such case the damage will be computed from the time of the original taking.³ The proper measure of damages determined in actions upon replevin bonds, in cases depending upon particular facts.⁴

§ 1340. **Loss from interruption of business should be recovered in the replevin action.** A manufacturer, from whom the entire machinery of his cloth printing factory in running order and actual use was replevied, including steam apparatus for supplying the motive power, took judgment for a return and for damages assessed by computing interest on the appraised value of the property from the date of the writ to the date of the judgment, under an agreement expressly provided to be without prejudice to his action on the

¹ *Clement v. Duffy*, 54 Iowa, 632 (7 N. W. 85).

² *Story v. O'Dea*, 23 Ind. 326.

³ *Smith v. Dillingham*, 33 Me. 384.

⁴ *Ackerman v. King*, 29 Tex. 291; *Ormsbee v. Davis*, 18 Conn. 555; *Leighton v. Brown*, 98 Mass. 515.

replevin bond. On the demand of the officer upon a writ of return, tender was made of all of the machinery except the steam apparatus, with an offer to pay the value of that or replace it. This tender was not accepted, and the writ was returned in no part satisfied, and suit brought on the bond; *Held*, (1) that the officer had a right to treat the property as an organized whole, and refuse the offer to return part of it; (2) that the manufacturer's claim for damages in the action of replevin included compensation for the general inconvenience and loss resulting from the interruption of his possession, and for the expense, trouble, and delay of restoring the factory to its former condition, as well as interest on the value of the property; but (3) that the claim was an entire claim and no portion of it recoverable in the suit on the bond, notwithstanding the proviso in the agreement under which he took his judgment; and (4) that the measure of his damages in the suit on the bond was the same which, under the ordinary circumstances attending a sale, might reasonably be agreed upon as a fair price for the property, between a seller desirous of selling and a buyer desirous of buying it, as a whole, to be used in the place from which it was taken, and for the purposes for which it was intended and arranged.¹

§ 1341. **Vindictive and punitive damages are not recoverable** in a suit on a replevin bond for a breach of the conditions thereof. The actual damages sustained by the defendant in replevin by reason of the wrongful suing out of the writ, are the only damages which can be properly averred and recovered in such an action. Attorney's fees paid in defending the replevin suit and damages arising from the depreciation in the value of the property during its wrong-

¹ *Stevens v. Tuite*, 104 Mass. 328. The court held that defendant was entitled to an amount of damage sufficient to put his mill machinery back in running order, as it was when taken, but that such damage should be given in the replevin suit, and not in suit on the bond, and cite *Fuller v. Shattuck*, 13 Gray, 70; *Homer v. Fish*, 1 Pick. 439; *Warren v. Comings*, 6 Cush. 103; *Bennett v. Hood*, 1 Allen, 47.

ful detention may be recovered. But damages to the good will of the business of the defendant in replevin cannot be so recovered. Where the declaration does not aver and claim specific damages for each of the several injuries mentioned, what is said as to such injuries may be rejected as surplusage.¹

§ 1342. **In justice court the damages are not limited by the jurisdiction of the justice.** In the summary proceedings against plaintiff and his sureties for failure to prosecute an action for the claim and delivery of specific personal property, before a justice of the peace, judgment may be rendered for the value of the property in any amount up to the full penalty of the bond, though it be in excess of the justice's jurisdiction in ordinary cases.² Having chosen their forum they cannot set up the jurisdictional limit of that forum as a bar to prevent an unwilling and wronged litigant from receiving full compensation for the injury they have inflicted. Where, under the practice, the defendant moves for his damages in the same court in which the replevin action was brought, this would seem to be a salutary and proper rule, but would not apply if defendant brought an independent action on the bond.

§ 1343. **Limit of damages recoverable—Illustrations.** On a judgment for a return or the value, if the judgment is not performed, the defendant can recover on the replevin bond the damage to him not exceeding the value of the property not returned.³ It is upon the plaintiff to show how much he has been damaged, and this is ordinarily done by proving the value of the property replevied. The bond stands in the place of the property, and if the plaintiff is sole owner or is responsible to a third person, he is entitled to its full value.⁴ The damages in case of a nonsuit are for a failure

¹ Dalby v. Campbell, 26 Ill. App. 502.

² Brunschweig v. Schaper, 4 Mo. App. 579.

³ Landers v. George, 49 Ind. 309.

⁴ Leonard v. Whitney, 109 Mass. 265; Austin v. Moore, 7 Met. 116;

to return, but not for the original taking and detention.¹ A replevin bond is only given to indemnify the obligee for any damages which may be adjudged him in the particular suit in which the bond has been given.² The fact that the plaintiff in an action of replevin was compelled to deposit a sum of money with his surety in the replevin bond as indemnity is not admissible in evidence as a foundation of a claim for damages.³ Where the property taken is not returned or found in the replevin suit, the measure is the value of the property and not what it sold for.⁴ In an action against sureties on a replevin bond, judgment can only be given for the penal sum mentioned in the bond and costs of suit, and not for the value of the replevied property when such value exceeds the sum fixed in the bond.⁵ A replevin bond to the sheriff was conditioned that if the sheriff should defend the replevin suit the obligors would indemnify and save him harmless from all costs, charges, and expenses which he should incur in defending such suit; *Held*, that no damages could be recovered, nor anything for costs, charges, and expenses not actually paid.⁶

§ 1344. The value found in the replevin suit with interest is a proper item of recovery on the bond. The finding of the jury in the replevin suit as to the value of the ice, where and when it was taken, is competent and conclusive evidence, as against the obligors, of such value. The plaintiff in the suit on the bond can recover that amount with interest thereon from the date of the verdict in the replevin suit, where there has been a total failure to return.⁷

Stevens v. Tuite, 104 Mass. 328; *Sahnigham v. Carter*, 12 Wend. 131; *Sedgwick on Damages* (5th Ed.), 500-1.

¹ *Ginaca v. Atwood*, 8 Cal. 446.

² *Boyer v. Fowler*, 1 Wash. Ter. 119.

³ *Danniels v. Fitch*, 8 Pa. St. 495; *Wilson v. Hillhouse*, 14 Iowa, 199.

⁴ *Schrader v. Wolfin*, 21 Ind. 238.

⁵ *Fraur v. Little*, 13 Mich. 195.

⁶ *Scott v. Tyler*, 14 Barb. (N. Y.) 202.

⁷ *Washington Ice Company v. Webster*, 125 U. S. 426 (8 S. C. R. 947).

The recovery on the bond is measured by the damages awarded in the replevin suit. The claim for damages by either party is entire and indivisible, and cannot be recovered, a part in each of several actions.¹ A judgment for a return of the property or its assessed value fixes the measure of the liability of the principal and his sureties on a replevin bond.² The finding of the jury, as to value of the property taken, will not be evidence of its value against the plaintiff or his sureties on the replevin bond in any but the statutory replevin.³ Upon a writ of inquiry of damages, upon a judgment by default or on demurrer for the plaintiff in an action upon a replevin bond, the value of the property as set out in the replevin is *prima facie* the measure of damages subject to parol evidence of the actual value.⁴ Where the property could have been returned but was not, but was converted, the value with interest thereon was allowed.⁵

§ 1345. **Interest on the value should be allowed.** In an action on a replevin bond the plaintiff is entitled to recover as damages the value of the goods, and generally interest thereon from the judgment of a return, and the costs of the original action.⁶ Interest is recoverable in an action of debt on a replevin bond where the defendant has not returned the property.⁷ The recovery against the sureties on a bond or undertaking can never exceed the penalty of it, and the costs incurred in the action on the bond.⁸ Interest of course is recoverable where the property has not been returned.⁹

¹ *Stevens v. Tuite*, 104 Mass. 328.

² *Carroll v. Woodlock*, 13 Mo. App. 574.

³ *Gordon v. Williamson*, 20 N. J. L. 77.

⁴ *Gibbs v. Bartlett*, 2 Watts & S. (Pa.) 29.

⁵ *Walls v. Johnson*, 16 Ind. 374.

⁶ *Peacock v. Haney*, 37 N. J. L. 179; *Caldwell v. West*, 1 Zab. 411.

⁷ *Hopkins v. Ladd*, 35 Ill. 178.

⁸ *Hefford v. Alger*, 1 Taunt. (Eng.) 218.

⁹ *Caldwell v. West*, 21 N. J. L. 411; *Leighton v. Brown*, 98 Mass. 515; *Hopkins v. Ladd*, 35 Ill. 178; *Ackerman v. King*, 29 Tex. 291.

§ 1346. **Where value not found in replevin suit, actual value allowed.** In an action on a replevin bond for failure to make return of the goods, the damages, not having been assessed in the replevin suit, may be assessed at the actual value of the goods at the time of the replevin. It was not necessary to have this value settled in the replevin action or to have judgment for a return.¹ Where plaintiff in replevin by his own act, as dismissing (or taking a change of venue unauthorized), prevents the assessment of damages in that suit, they may be recovered in a direct suit on the bond. If the replevin suit is tried on its merits, and the damages are not settled, they can not be recovered in an independent action.²

§ 1347. **Measure where property attached to real estate and mortgaged and not actually taken possession of.** Although it is not a good excuse that it is not in the power of defendant to return the property,³ still upon the question of damages this may be shown, or it may be shown that the property was never actually taken into custody because attached to the realty and mortgaged. And in such a case the measure of damages would be the amount of the loss sustained by the execution creditor by the failure of the defendant to deliver the property at the time required; not what the property would have been worth if unaffected by infirmity or prior liens, but its value subject to any defects or incumbrances that existed at the time replevied.⁴

§ 1348. **Rule in replevin of attached property.** Damages recovered by an officer upon the replevin bond for replevin of attached property are held in trust, after payment of his fees and expenses, for the benefit of both the attaching creditor and the debtor.⁵ The surety on the replevin

¹ *Gibbs v. Bartlett*, 2 W. & S. (Pa.) 29; *Bank v. Hall*, 107 Pa. 583.

² *Morrison v. Yancey*, 23 Mo. App. 670; *White v. Van Houten*, 51 Mo. 577.

³ *Buckmaster v. Beames*, 4 Gilm. 443.

⁴ *Jackson v. Bry*, 3 Bradw. (Ill.) 586; *Dehler v. Held*, 50 Ill. 491.

⁵ *Mattoon v. Pearce*, 12 Mass. 406.

bond of a defendant in attachment, where it is proposed to enter judgment against him, may contest original liability on the bond, or show a discharge from its obligations. But he cannot plead to the action or interpose any defense, nor can he complain of mere errors in the action against his principal. His right to defend in the trial court commences after the finding against his principal. The bond is what connects the surety with the case, and after the bond has been given and the property delivered, his liability cannot be changed.¹ It is not competent for the sureties in a replevin undertaking to prove that the owner had no attachable interest in the property, or that the attaching creditor was not injured by their failure to return the same.²

§ 1349. **Damages, how determined—Limit—Attachment.** In suit on the bond the liability is not to be measured by the value of the interest in the property of the attachment debtor, for whose debt it was seized by the sheriff. The value of the property at the time it was replevied, limited by the debt still due on the attaching creditor's judgment and the penalty of the replevin bond, are the elements for ascertaining the damages in the suit on that bond.³ The measure of recovery on a replevin bond, where the judgment in replevin was for the face of certain attachment writs, is not the amount of that judgment, but defendants may show that the judgments rendered in the attachment proceedings were for a less amount than that called for by the writs of attachment, and this is not a collateral attack of the judgment rendered in replevin.⁴ Where goods were replevied from an attaching officer, and the plaintiff proved to be a wrongdoer, without title to any part of the goods attached, in an action upon the replevin bond, the defendant cannot show in defense the invalidity of the attachments, nor

¹ *Atkinson v. Foxworthy*, 53 Miss. 733.

² *Caldwell v. Gans*, 1 Mont. 570.

³ *Sweeney v. Lomme*, 22 Wallace, 208.

⁴ *Wheaton v. Thompson*, 20 Minn. 175.

claim that the officer, after paying off the attachment, was accountable for the residue of the property attached to him; nor could a mere release to the officer, by the debtor, of all claim to the goods inure to the benefit of the defendant.¹

§ 1350. **Where part of the goods is returned injured.** Where there is a judgment of return against the plaintiff in replevin, and he fails to return some of the goods, and returns the rest injured by bad packing and storage, the measure of damages in a suit on his undertaking is the value of the goods not returned, with legal interest from the time of the replevin, and deterioration in value of those returned, resulting from the causes named, with legal interest thereon from the date of their return; and the failure of the jury in replevin to assess the value of the property does not affect the recovery on the bond.²

§ 1351. **In case of distress.** The liability of the securities on a replevin bond, executed in the proceedings under a distress warrant, is limited to the amount found to be due on the claim, to secure which the distress warrant was issued and the costs of the suit. They are not liable to the extent of their bond for any other amount for which judgment may be rendered against their principal in the same proceeding arising out of another cause of action.³ In an action on a replevin bond, the value of the goods, if less than the rent due, or the rent due, if the value of the goods exceed it, is the measure of the plaintiff's damage, and where evidence of

¹ Farnham v. Moor, 20 Me. 508.

² Yelton v. Slinkard, 85 Ind. 190; Whitney v. Lehmer, 26 Ind. 503; Noble v. Epperly, 6 Ind. 468; Chissom v. Lamcool, 9 Ind. 530; Mitchell v. Burch, 36 Ind. 529; Blackwell v. Acton, 38 Ind. 425; Stevens v. McClure, 56 Ind. 384; Robinson v. Shatzley, 75 Ind. 461; Singer Manufacturing Company v. Doxey, 65 Ind. 65; Brown v. Parker, 5 Blackf. 291.

³ Crawford v. Hagood, 40 Tex. 395. This case started out as a replevin of property seized for rent, and both parties brought in accounts against the other in the progress of the suit, and finally judgment was rendered against plaintiff for the rent claimed, and much more on other causes of action, and defendant attempted to collect his whole judgment out of the sureties on the replevin bond.

the value of the goods was excluded at the trial a new trial was awarded.¹ Judgment ought not to be rendered on a three months' replevin bond for interest from a day anterior to the date of the bond. It should be for interest from that date on the rent and costs of the distress. If the interest is from such anterior day, it may be deducted as erroneous on appeal.²

§ 1352. **Measure of damages—Suit by one having special interest only.** In an action on a replevin bond, a party having a special property in the articles replevied is entitled to recover, as against a stranger having no interest therein, not merely to the extent of his special interest, but the full value of the property, and the excess beyond his special interest he will hold in trust for the general owner.³ Personal property owned in common was attached on *mesne* process against one of the owners, and replevin brought in the name of all against the attaching officer and dismissed. *Held*, that the measure of damages in an action on the replevin bond was the value of that one's interest.⁴ The sureties on a replevin bond are only liable to the extent of the value of the property replevied, and the jury, in finding against the defendant in attachment, should assess the value of the property as well as the amount of the debt.⁵ When the defendant in replevin is an officer who has acquired a special interest in or title to the property replevied by virtue of a writ of attachment against the owner, he is entitled to retain custody of the property until the demand is satisfied. But in the absence of an order awarding the property to his custody, he must affirmatively show, in an action on the bond, that the demand has not been been satisfied; otherwise it will not appear how or to what extent he has been damnified.⁶ A sheriff suing on a

¹ Hart v. Tobias, 1 Brev. (S. C.) 199.

² Williams v. Howard, 3 Munf. (Va.) 277.

³ Atkins v. Moore, 82 Ill. 240.

⁴ Bartlett v. Kidder, 14 Gray (Mass.), 449.

⁵ Young v. Pickens, 45 Miss. 553.

⁶ Imel v. Van Doren, 8 Col. 90 (5 P. 803); Petrie v. Fisher, 43 Ill. 442; 2 Sutherland on Damages, p. 46.

replevin bond is entitled to no more than will indemnify him.¹ The defendant in replevin should, upon the replevin bond, recover no more than his legal damages; and if he had no more than a possessory or partial interest in the property, and was in no position to hold the entire interest for someone else, then he should not recover the full value.²

§ 1353. **In case of partners.** Where one partner attempts to replevy from another the defendant's damages are in proportion to his interest in the property.³ A plaintiff who brings replevin against a partner and gets possession of firm property, when sued on his bond, cannot urge his part ownership in mitigation of defendant's damages. He must compensate the defendant for the damage or return the property.⁴ So where a landlord was a joint owner with his tenant, and so defeated the action of his tenant and had judgment of return, and sued on the bond, *held*, that he could only recover the value of his interest.⁵

§ 1354. **As between mortgagee and mortgagor** the measure of damages in an action upon the replevin bond is the amount due on the mortgage; and evidence tending to prove that that relation existed between the principal obligor and the plaintiffs in replevin should be received.⁶

§ 1355. **When only nominal damages will be allowed.** Where defendant had no title he can only recover nominal damages on the bond.⁷ In an action by the obligees against the obligors in a replevin bond, where the title to the property was not determined in the replevin suit, and the title thereto and the right of possession are in a person other

¹ *Lindner v. Brock*, 40 Mich. 618.

² *Pearl v. Garlock*, 61 Mich. 419 (28 N. W. 155).

³ *Crabtree v. Chapham*, 67 Me. 326.

⁴ *Chapham v. Crabtree*, 72 Me. 473.

⁵ *Mason v. Sumner*, 22 Md. 312.

⁶ *Perigo v. Grimes*, 2 Col. 651; *Warner v. Matthews*, 18 Ill. 83; *Sedgwick Measure of Damages*, 580.

⁷ *Jones v. Smith*, 79 Me. 452 (10 A. 256).

than the obligees, they are only entitled to nominal damages.¹ In a suit on a replevin bond the plaintiff may recover damages for detention, although these were not assessed in the judgment in the replevin suit.² In the absence of evidence showing the value of property replevied, and the value of its use since judgment was given in the replevin suit, only nominal damages can be allowed. Upon the condition in the bond to prosecute the suit to effect and without delay, damages for detention of the property, pending the replevin suit and before judgment for a return was given, cannot be recovered unless they were awarded in the replevin suit.³

§ 1356. **Where suit dismissed.** Where the plaintiff voluntarily dismisses an action of replevin after he has taken the property, the defendant may commence an independent action on the bond and recover therein all his damages sustained by the taking of the property, including therein, if the title be in him, the value of such property.⁴ If a plaintiff in replevin neglect to prosecute the replevin to final judgment, in conformity with the conditions of his bond, the defendant in replevin may have judgment for nominal damages in an action on the bond, even if he had no lawful title in the replevied property.⁵ But where plaintiff withdrew his action and the court found the title against him, the sureties are bound by this finding in the replevin action and can not show in bar of their liability that the property belonged to their principal, as that would be a collateral attack on the judgment in the first action.⁶

§ 1357. **Rule of damages in suit on redelivery bond.** In an action on a bond given by the defendant in replevin,

¹ Stockwell v. Byrne, 22 Ind. 6. See Crabbs v. Koontz, 69 Md. 60 (13 A. 591).

² Thomas v. Spofford, 46 Me. 408.

³ Sopris v. Lilley, 2 Col. 496.

⁴ Manning v. Manning, 26 Kan. 98.

⁵ Smith v. Whiting, 100 Mass. 122.

⁶ Ormsbee v. Davis, 16 Conn. 567. A contrary decision is announced in Allen v. Woodford, 36 Conn. 143, but the facts are not identical.

on a claim of property, conditioned for a return of goods, the measure of damages is the value of the goods; the costs in the replevin suit cannot be recovered in this action. It is otherwise in an action on the replevin bond given by the plaintiff in replevin.¹ The damages allowed in suit on any statutory bond are governed largely by the statute and by the wording of the bond on which the suit is brought. If the delivery bond follow the form laid down for the replevin bond the rule of construction is the same. Where the defendant in replevin gives bond and retains the property, this bond is liable for costs of the action if adjudged against defendant; his surrender of the property does not affect their liability for costs.² Where the plaintiff recovers judgment for the possession of the property (which is still in defendant's possession), with damages for its detention and for a fixed sum in case a return cannot be had, he cannot maintain an action against the surety on the bond given by defendant until an execution has been issued for the return of the property and returned unsatisfied.³

§ 1358. **Costs of court—Costs in retaking the property—Attorney's fees recoverable.** The costs of a *retorno habendo*, as well as the costs in the replevin suit, are part of the damages recoverable on the replevin bond. If there was a breach of the bond in not returning the property, the plaintiff should be allowed to show all it cost to get the property back in a suit on the bond.⁴ Attorney's fees and costs, incurred in defending the action in detinue, and any damages actually sustained from the seizure and detention of the property, are legitimate subjects of recovery, but loss of time and

¹ *Lutes v. Alpaugh*, 23 N. J. L. (3 Zab.) 165.

² *Phillips v. Cooper*, 59 Miss. 17.

³ *Hager v. Clute*, 10 Hun. (N. Y.) 447.

⁴ *Langdoc v. Parkinson*, 2 Bradw. (Ill.) 136; *Tibbal v. Cahoon*, 10 Watts, 232; *Balsey v. Hoffman*, 1 Harris (Pa.), 603; *Arnold v. Bailey*, 8 Mass. 145; *Lutes v. Alpaugh*, 3 Zab. (N. J.) 165; *Leighton v. Brown*, 98 Mass. 515; *Seldner v. Smith*, 40 Md. 602; *Peacock v. Haney*, 37 N. J. L. 179.

hotel bills paid, while procuring sureties on the replevin bond, or in attendance on the trial, are too remote and variable.¹ Costs and expenses of defending the replevin suit are proper elements of recovery on the replevin bond.² In an action on a replevin bond containing a condition "for the payment of all costs and damages occasioned by the wrongful suing out" of the writ, attorney's fees may be recovered.³ Costs incurred by defendant in the replevin suit are recoverable by him in an action on the bond, but costs made by plaintiff are no charge on the bond, but are the personal obligation of the plaintiff.⁴

§ 1359. **Interest on the penalty of the bond may be allowed when needed.** The liability of the surety in replevin is limited by the penalty of the bond; his liability may be less than that amount—it cannot be more—and the costs of the suit on the bond.⁵ The more difficult and disputed question is, whether, after breach of the condition, the sureties are liable for interest for the delay in payment, by way of damages for the breach. The Michigan court, by a divided bench, after an exhaustive review of the authorities, *held* that interest could not be recovered on the penalty.⁶ But I think, upon the authorities, the better doctrine is that the party wronged is entitled to interest on the penalty of the bond

¹ *Foster v. Napier*, 74 Ala. 393. See also *Bolling v. Tate*, 65 Ala. 417; *Renfrew v. Hughes*, 69 Ala. 581; *Mills v. Long*, 58 Ala. 458; *Ferguson v. Barber*, 24 Ala. 402. But see *Davis v. Crow*, 7 Blackf. (Ind.) 129; *Kenley v. Commonwealth*, 6 B. Mon. (Ky.) 583.

² *Sweeney v. Lamme*, 22 Wallace (U. S. S. Ct.), 208.

³ *Harts v. Wendell*, 26 Ill. App. 274. See *Dalby v. Campbell*, 26 Ill. App. 502.

⁴ *Kellar v. Carr* (Ind.), 21 N. E. 463.

⁵ *Kellar v. Carr* (Ind.), 21 N. E. 463; *Hefford v. Alger*, 1 Taunt. 218; *Evans v. Brander*, 2 H. B. L. 547; *Paul v. Goodluck*, 2 Bing. (N. C.) 220; *Wilde v. Clarkson*, 6 Term, 303; *Branscombe v. Scarbrough*, 6 Q. B. 13; *Clark v. Bush*, 3 Cow. 151; *Farrer v. United States*, 5 Pet. 372; *Hunt v. Bond*, 2 Dowl. 558; *Ward v. Henley*, 1 Y. & J. 258; *Gould v. Warner*, 3 Wend. 54; *Kaufman v. Wessel*, 14 Neb. 161 (15 N. W. 219).

⁶ *Fraser v. Little*, 13 Mich. 198.

from the date of the judgment in replevin to date of judgment on the bond, if his damage in the replevin suit was equal to or greater than the penalty named in the bond.¹ The damages on a replevin bond may exceed the amount of the bond by the interest on the amount named in the bond from the date of the breach, if the whole penalty be needed to indemnify the obligee.²

¹ *Brainard v. Jones*, 18 N. Y. 35; *Hughes v. Wickliffe*, 11 B. Mon. 202; *Walcott v. Harris*, 1 R. I. 404; *Leighton v. Brown*, 98 Mass. 516; *Judge of Probate v. Heydock*, 8 N. H. 493; *Murfrees Official Bonds*, § 609, and cases cited; *Carlton v. Dixon*, 14 Or. 293 (12 P. 394).

² *Wyman v. Robinson*, 73 Me. 384.

CHAPTER XLVII.

DEFENSES TO SUITS ON REPLEVIN BOND.

	Section.		Section.
What defenses are proper to suit on the bond . . .	1360	That the property has been eloiigned or ceased to exist or died—How far a defense	1376
What defenses may beset up	1361	That it cannot be returned no defense	1377
Any material alteration in bond is a good defense .	1362	What may be shown in mitigation of damages . . .	1378
The judgment in replevin is conclusive as to all matters properly triable in that action	1363	Rule against a stranger to the title is more strict .	1379
Matters litigated in the replevin suit cannot be retried in the suit on the bond	1364	Matters in mitigation of damages—Illustrations .	1380
Property in a stranger is no defense to suit on the bond	1365	That the plaintiff has been partly paid in another proceeding is a defense <i>pro tanto</i>	1381
The obligors are estopped from alleging irregularities back of the judgment in replevin	1366	The same	1382
The same—Illustrations .	1367	Set-off may be allowed in suit on bond	1383
Defects in the replevin proceedings are of no avail in the suit on the bond . .	1368	Illustrations of matter not allowed to be shown in mitigation of damages .	1384
Where the replevin suit was not tried on its merits more latitude is allowed in making defense	1369	Evidence—In certain cases—Illustrations	1385
The same	1370	The judgment and pleadings in the replevin case are competent evidence in the suit on the bond . . .	1386
<i>Per contra</i>	1371	A party in his suit on the bond must occupy a position consistent with his position in the replevin suit	1387
The plea must answer all the material allegations of the petition	1372	A return to be a full defense must fully comply with the order of the court . . .	1388
The same—Illustrations .	1373	A return of part of the property is a defense <i>pro tanto</i>	1389
Pleas held not good under certain circumstances .	1374	New title acquired since the	
Satisfaction, no judgment, release, are all good defenses	1375		

	Section.		Section.
bond was given and before the judgment in replevin no defense— <i>Res adjudicata</i> . . .	1390	Damages for failure to return should be recovered from the replevin and not from the appeal bond . . .	1393
Effect of a return after suit brought on bond . . .	1391	In an action for the mali- cious prosecution of a re- plevin suit . . .	1394
It is a good defense that plaintiff had the possession of the property . . .	1392		

§ 1360. What defenses are proper to suit on the bond.

In the absence of any statutory provision on the subject, it may be said in general that any defense is proper by the obligors in a suit on a bond except such matters as were properly in issue in the replevin action; as to such matters the decision there rendered is conclusive, and they cannot be re-examined into, and what was there decided is a matter of law to be determined by the court. The obligors cannot show irregularity in the replevin proceedings. Such defenses are concluded by the judgment in replevin. Courts have made a distinction between matter offered only in mitigation and matter offered to bar a recovery, allowing more latitude in the former than in the latter case, and where the replevin was dismissed or not tried upon the merits more latitude has been allowed. The aim of the courts in suits on the bond has been to give full compensation for injury and nothing more. Vindictive or punitive damages are unknown in this action.

§ 1361. What defenses may be set up. Any fact which the defendant is not estopped by the judgment to set up may be availed of to limit the amount for which he and the sureties shall be held liable on the bond. The rights of the parties are capable of adjustment in a suit upon the bond.¹ Thus, when the ownership of the property is not settled in the replevin suit, as it ordinarily is, it may be set up in the suit on the bond,² where the statutes permit the averment of

¹ Leonard v. Whitney, 109 Mass. 265.

² Sherry v. Foresman, 6 Blackf. 56; Davis v. Crow, 7 Blackf. 130; Williams v. Vail, 9 Mich. 162; Cushenden v. Harman, 2 Tyler (Vt.), 431.

such matters and their relitigation, as it does in some states.¹ It must be pleaded and shown affirmatively that the case comes within the statute.² That another bond has been given under an agreement that it should take the place of the property, is a bar to a suit on the replevin bond.³ In an action of replevin where the defendant and sureties give a redelivery bond, and the property is returned to the defendant, and afterward judgment is rendered in favor of plaintiff, and against the defendant in the alternative, which judgment is not performed or satisfied, and the plaintiff sues on the bond, *held*, that no defense can be set up in the action on the redelivery bond which could, with reasonable diligence, have been set up or interposed in the replevin action.⁴

§ 1362. **Any material alteration in bond is a good defense**, and avoids the bond. Thus where the principal erased his name from a bond to a United States marshal, without the consent of his sureties, but with the consent of the marshal, it operated as a release of the sureties.⁵ The decision could be better put upon the ground of the release of the principal than on the change of the bond. A replevin bond is governed by the same rule as to alterations as any other bond.

§ 1363. **The judgment in replevin is conclusive as to all matters properly triable in that action**, and such matters cannot be urged in defense of a suit on the replevin bond.⁶ But it was afterwards *held* under a statute, passed to meet just such cases,⁷ that sureties could attack the judg-

¹ Chenn v. McCoy, 19 Ill. 606; Rev. Stat. Ill. 1874, 853.

² King v. Ramsay, 13 Ill. 622.

³ Busch v. Fisher (Mich.), 41 N. W. 325.

⁴ Boyd v. Huffaker, 40 Kan. 634 (20 P. 459). See Hartlepp v. Cole (Ind.) 22 N. E. 130.

⁵ Martin v. Thomas, 24 How. (U. S.) 316.

⁶ Jacobson v. Metzgar, 43 Mich. 403 (5 N. W. 445); Williams v. Vail, 9 Mich. 162.

⁷ "In any action prosecuted on such bond, given by the plaintiff in an action of replevin for the deliverance of any property, the defendant may show, in mitigation of the damages, that the obligee in such bond

ment in replevin by showing that one of them had a special interest, as a chattel mortgage on the property which antedated the levy thereon.¹ The sureties on a replevin bond cannot question the ownership of the property in a suit on the bond on this question. The judgment in replevin is conclusive, and it will be presumed that the verdict and pleadings were sufficient to support the judgment rendered in that action.² It is no defense to an action on a replevin bond, that the amount thereof was less than double the value of the property replevied, although such defect may have been cause for a dismissal of the action of replevin before the trial. In a suit upon the replevin bond, the defendant is estopped from setting up the insufficiency of the penalty of the bond as a defense, after the writ of replevin has been issued and possession of the property obtained upon it,³ or that the bond was void.⁴ Neither can he set up as a defense that the writ issued by the justice was defective, and that on appeal the circuit court dismissed the action for want of a proper writ and summons in the justice court. The dismissal is a breach of the bond, even though it was ordered on motion of the obligee in the bond, on account of the defects in the writ.⁵

"had only a lien upon, or special property, or part ownership in, said property at the time of commencement of suit in replevin, and that the defendants, or either of them, had at the same time a part ownership or other valuable interest in said property; and if such lien, special property, part ownership, or other interest of said obligee, with interest thereon, amount to less than the value of the property replevied, a corresponding reduction shall be made from such value." Comp. L. § 6766.

¹ Henry v. Quackenbush, 48 Mich. 415 (12 N. W. 634).

² McMurchy v. O'Hair, for use, etc., 67 Ill. 242; Hawley v. Warner, 12 Iowa, 42; City Council v. Price, 1 McCord (S. C.), 299.

³ Trueblood v. Knox, 73 Ind. 310; Caffrey v. Dudgeon, 38 Ind. 512 (10 Am. R. 126); Deardorf v. Ulmer, 34 Ind. 353; Wiseman v. Lynn, 39 Ind. 250; Tyler v. Bowlus, 54 Ind. 333.

⁴ Chaffee v. Langston, 10 Watts (Pa.), 265.

⁵ Waddell v. Bradway, 84 Ind. 537; Sammons v. Newman, 27 Ind. 508; Caffrey v. Dudgeon, 38 Ind. 512 (10 Am. R. 126).

§ 1364. **Matters litigated in the replevin suit cannot be retried in the suit on the bond.** The same matters litigated in a replevin suit may not be re-examined in a suit upon the replevin bond.¹ Having received the property he cannot defeat his liability by plea that the bond was given for ease and favor, or that the law was unconstitutional,² nor that he was not indebted.³ All matters determined in the replevin suit are *res adjudicata*, and cannot be inquired into in the suit on the bond.⁴

§ 1365. **Property in a stranger is no defense to suit on the bond.** The plaintiff in a replevin suit, in which the judgment was that the property replevied should be returned to the defendant, cannot avoid a recovery against him on the replevin bond by showing that the said property belonged to a stranger.⁵ A plea to an action on a replevin bond, given in attachment, that the property attached and replevied did not belong to the defendant in attachment, but to a stranger, is bad.⁶

§ 1366. **The obligors are estopped from alleging irregularities back of the judgment in replevin.** Where the plaintiff in a replevin proceeding obtains possession of the property, neither he nor his sureties can, in an action on the bond, impeach the sheriff's return, or question the authority of the person who seized the property upon the writ and from whose hands he accepted it,⁷ and they are estopped to deny the regularity of the proceedings or to say that there was no consideration for the bond executed by them.⁸ In

¹ Colorado Springs Co. v. Hopkins, 5 Col. 206; Warren v. Matthews, 18 Ill. 83.

² Magruder v. Marshall, 1 Blackf. 333.

³ Warner v. Matthews, 18 Ill. 83.

⁴ Denny v. Reynolds, 24 Ind. 248; Wallace v. Clark, 7 Blackf. 298.

⁵ Smith v. Lisher, 23 Ind. 500; Lomme v. Sweeney, 1 Mount. 584.

⁶ Sartin v. Weis, 3 Stew. & P. (Ala.) 421.

⁷ McFadden v. Ross, 108 Ind. 512 (8 N. E. 161); City Council v. Price, 1 McCord (S. C.), 299; Chaffee v. Langston, 10 Watts (Pa.), 265.

⁸ McFadden v. Fritz, 110 Ind. 1 (10 N. E. 120); Hartlepp v. Cole (Ind.) 22 N. E. 130.

an action upon a replevin bond, the fact that the defendant had commenced his action before a tribunal incompetent to try the matter in dispute is no defense, and the plea that the title to the property so replevied was in him is bad.¹

§ 1367. **The same—Illustrations.** Where a plaintiff in replevin has received the property and kept it, in a suit on the bond for failure to return as ordered by the judgment in replevin, neither he nor his sureties will be allowed to set up as a defense that the justice could not approve the bond, being related to the parties within the sixth degree,² or that no action was pending in which a bond could be given,³ or that the penalty was less than double the value of the property and the bond therefore void.⁴ But if the court taking the bond had no jurisdiction over the subject-matter of the suit, the rule would be different.⁵ But, otherwise, he is estopped to show want of jurisdiction.⁶ Obligors in a replevin bond cannot escape liability on the ground of irregularities in the institution or prosecution of the replevin suit, or of technical defects in the bonds themselves.⁷ The defendant in replevin may waive all defects in the bond which do not go to the substance and are not jurisdictional, and enforce the bond against the principal and sureties.⁸ The principal

¹ *McDermott v. Isbell*, 4 Col. 113.

² *Harbough v. Albertson*, 102 Ind. 69 (1 N. E. 298).

³ *Sammons v. Newman*, 27 Ind. 508.

⁴ *Trueblood v. Knox*, 73 Ind. 310; *Carver v. Carver*, 77 Ind. 498. See also *Waddell v. Bradway*, 84 Ind. 537; *Falkner v. Baden*, 89 Ind. 587.

⁵ *Caffrey v. Dudgeon*, 38 Ind. 512 (10 Am. R. 126).

⁶ *McDermott v. Isbell*, 4 Col. 113.

⁷ *Nichols v. Standish*, 48 Conn. 321; *Roman v. Stratton*, 2 Bibb, 199; *Nunn v. Goodlett*, 5 Eng. (Ark.) 90; *Jennison v. Haire*, 29 Mich. 208; *Bigelow v. Comegys*, 5 Ohio St. 256; *Roderbaugh v. Cady*, 1 West. L. M. (Ohio) 599; *McDermott v. Isbell*, 4 Col. 113; *Buck v. Lewis*, 9 Minn. 317; *Moors v. Parker*, 3 Mass. 310; *Wolcott v. Mead*, 12 Met. 517; *O'Grady v. Kees*, 1 Allen, 284; *Shaw v. Tobias*, 3 Comst. 192; *Decker v. Judson*, 16 N. Y. 439; *Persse v. Watrous*, 30 Conn. 139; *Morse v. Hodsdon*, 5 Mass. 314; *Faut v. Wilson*, 3 Mon. (Ky.) 342.

⁸ *Show v. Tobias*, 3 Comst. (N. Y.) 188; *Wolcott v. Meade*, 12 Met. (Mass.) 517.

is in all cases liable without regard to the bond. The bond is only important as regards the liability of the sureties.¹ In an action upon a replevin bond the judgment in the replevin suit, for a return of the property, cannot be impeached as evidence for lack of proof that any affidavit accompanied the writ of replevin; it will be presumed that all proceedings essential to its validity were taken. Plaintiffs in a replevin suit against whom a judgment for a return of the property has been rendered, are estopped when sued upon their bond from setting up in defense any infirmities in the proceedings by which they obtained the possession of the property. Neither can they set up as a defense that the officer failed to find and seize the property. Their obligation imposes upon them active measures to surrender it if a return is awarded.² And defendants cannot be heard to object that the execution issued on the judgment in replevin was irregularly or improperly issued and returned unsatisfied.³

§ 1368. **Defects in the replevin proceeding are of no avail in the suit on the bond.** In a suit on a replevin bond the defendants cannot avail themselves of the failure of the court to render in the replevin suit the alternative judgment for the return of the property or its value, even if that were an error for which that judgment might be reversed in a direct proceeding.⁴ It is no defense to a surety in a suit against him on the replevin bond that an erroneous judgment has been rendered against his principal, as for the value of the goods instead of for a return.⁵

§ 1369. **Where the replevin suit was not tried on its merits, more latitude is allowed in making defense in suit on the bond, and title may be shown in mitigation of dam-**

¹ *Creamer v. Ford*, 1 Heisk. 308.

² *Jennison v. Haire*, 29 Mich. 207; *Decker v. Judson*, 16 N. Y. 439; *Show v. Tobias*, 3 Comst. 192; *Moors v. Parker*, 3 Mass. 310.

³ *Harrison v. Wilkin*, 78 N. Y. 390.

⁴ *Sweeney v. Lomme*, 22 Wallace (U. S. S. Ct.), 208. See *Boley v. Griswold*, 20 Wallace, 486.

⁵ *Mason v. Richards*, 12 Iowa, 73.

ages.¹ When suit is instituted on a replevin bond, and the appellant seeks to defeat a recovery upon the ground that the merits of the controversy were not tried, the burden as to the right of property rests upon him, the same as in the replevin suit.² In an action of debt on a replevin bond, where the merits have not been tried in the replevin suit, the defendant may plead such fact, and his title to the property in dispute; but his plea must show on its face that the right of property had not been determined in the replevin suit.³ Where plaintiff in replevin discontinued, and judgment for value was rendered against him, *held*, that it was competent to show as a defense to suit on the bond that the property belonged to plaintiff at the time it was replevied, and he was still such owner. Where, in such a case, judgment of return is waived by defendant, all questions in issue must be settled on the assessment of damages, and are not afterward open.⁴ A plaintiff in replevin, by suffering his suit to be dismissed, loses all right to contest the claim of the defendant in replevin to the property. He cannot contest the validity of the judgment or execution under which the property was taken. But he may plead that the merits of the action were not tried, and set up title to the property in himself in mitigation of damages, but the burden is on him to prove his title, and if he show a *prima facie* case the other party may introduce evidence to controvert it.⁵

§ 1370. **The same.** In an action on replevin bond, where the merits were not tried in the original action, the defendant can only plead property in himself in mitigation of damages.⁶ In an action upon a replevin bond, the defendants

¹ *Smith v. Whiting*, 100 Mass. 122; *Allen v. Woodford*, 36 Conn. 143; *Jones v. Smith*, 79 Me. 452 (10 A. 256).

² *Gullett v. Otey*, 19 Bradw. (Ill.) 182.

³ *Lee v. Grimes*, 4 Col. 185.

⁴ *Pearl v. Garlock*, 61 Mich. 419 (28 N. W. 155); *Williams v. Vail*, 9 Mich. 162; *Ryan v. Akely*, 42 Mich. 516.

⁵ *Stevison v. Earnest*, 80 Ill. 513.

⁶ *Holler v. Coleson*, 23 Ill. App. 324.

who, in their action of replevin, had discontinued upon their own motion, suffered judgment to go by default. Upon the execution of the writ of inquiry to assess the plaintiff's damages, the defendants were, notwithstanding, permitted to give evidence of their title to the articles replevied in mitigation of damages.¹ In a suit on a replevin bond, evidence of the value of the property before and after the time of its being replevied was allowed under the circumstances of the case.² A judgment in replevin does not conclude the obligors in the bond from proving by the proceedings in the cause, or *aliunde*, the character of the possessory right upon which the plaintiffs in the action on the bond recovered in the replevin suit.³

§ 1371. **Per contra.** Although the rule is as just shown, a contrary rule has been followed by several courts. Where plaintiff in replevin suffered judgment by default, and the defendant waived return and had his damages assessed, *held*, that in a suit on the replevin bond the defense could not introduce evidence in reduction of the judgment in replevin.⁴ Where a plaintiff in replevin suffers a voluntary dismissal or nonsuit, and judgment of *retorno habendo* is awarded, the defendant in an action on the replevin bond cannot show property in the plaintiff in replevin, either in mitigation or in bar of the action.⁵

§ 1372. **The plea must answer all the material allega-**

¹ *Belt v. Worthington*, 3 Gill. & J. (Md.) 247.

² *Balsley v. Hoffman*, 13 Pa. St. 603.

³ *Mason v. Sumner*, 22 Md. 312.

⁴ *Ryan v. Akeley*, 42 Mich. 516 (4 N. W. 207).

⁵ *Clark v. Howell*, 3 Col. 564. This was rendered under the following statute: "In any action upon any bond, given as required by the provisions of this chapter, where the merits of the case have not been determined in the action of replevin in which such bond was given, the defendant may plead such fact, and also their title, or the title of any one or more of them to the property in dispute in such action of replevin, except in cases where the plaintiff, in such action of replevin, shall have voluntarily dismissed his suit or submitted to a nonsuit therein." R. S., p. 540, § 14.

tions of the petition. To a suit on a replevin bond, assigning as breaches a failure to prosecute the suit, failure to make return of the goods, and a failure to pay the costs adjudged, etc., the defendant pleaded in bar of the whole action that the merits of the cause were not tried on the replevin suit, and that defendant was owner of the goods, etc. *Held*, bad on general demurrer. It did not attempt to answer the breaches of failure to prosecute and to pay costs.¹ Where, to a petition in suit on the bond, defendant answered (1) *non damnificatus*; (2) if the plaintiff was injured it was by his own wrong; (3 and 4) that the goods belonged to the principal obligor; (5) that the principal obligor was ready and willing to prosecute his suit with effect, but that the court at the instance of the plaintiff dismissed the suit for want of jurisdiction on account of defects apparent in the affidavit and the writ, and that no damages were recovered in the replevin suit, nor was a return of property awarded; (6) that the bond was executed without consideration; (7) that the consideration was illegal; (8) no record of the replevin suit. Plaintiff demurred and the court held the demurrer good as to all except the last.² That property belonged to plaintiff is bad,³ but such evidence has been allowed in mitigation of damages.⁴

§ 1373. **The same—Illustrations.** An answer to an action on a replevin bond, which admits that defendant did not prosecute the action of replevin with effect and without delay, and did not return the property to the sheriff when so ordered to do by the court, is bad and no bar to the action on the bond.⁵ In *sci. fa.* against replevin bail, the pleas

¹ *Gale v. Rector*, 10 Bradw. (Ill.) 262; *The People v. McCormick*, 68 Ill. 226; *Dickenson v. Hendryx*, 88 Ill. 66.

² *Sherry v. Foresman*, 6 Blackf. 56.

³ *Davis v. Crow*, 7 Blackf. (Ind.) 129.

⁴ *Wallace v. Clark*, 7 Blackf. (Ind.) 298; *Chinn v. McCoy*, 19 Ill. 604.

⁵ *Landers v. George*, 49 Ind. 309; *Brown v. Parker*, 5 Blackf. 291; *Sherry v. Foresman*, 6 Blackf. 56; *Wallace v. Clark*, 7 Blackf. 129; *Hutton v. Denlon*, 2 Ind. 644; *O'Neal v. Wade*, 3 Ind. 410.

were: (1) no execution issued against the goods of the principal, (2) *non est factum*. *Held*, that the issues on plaintiff's part must be proved by producing the execution or a certified copy of it, and proving the execution of the entry of the bail, the same as the execution of other instruments in writing are required to be proved.¹ In a suit on a replevin bond, conditioned to prosecute the action with effect and without delay, and return the property if a return be adjudged, and pay all sums of money recovered against plaintiff, an answer by a surety, "that the plaintiff's ownership of the property "was subject to a mortgage thereon held by the surety," is bad, and states no defense.² So, also, an answer of property in the principal of the bond, the question of ownership and right to possession being *res adjudicata*.³ But where the replevin suit is dismissed without a final adjudication such answer is good in mitigation of damages in suit on the bond.⁴

§ 1374. **Pleas held not good under certain circumstances.** In an action against the surety upon a replevin bond, the surety, having had notice of the plaintiff's title, cannot set up in defense an arrangement between the plaintiff and the defendant, by which the apparent ownership of the chattel was given to the defendant; nor can he set up an arrangement between them for an illegal purpose, when he was not defrauded thereby.⁵ To a declaration on a replevin bond the defendant pleaded that the action in replevin was dismissed by agreement of parties. *Held*, that the plea was bad, and that an agreement to dismiss without a return of the property would be a breach of the bond unless the return was waived.⁶ In an action on a replevin bond

¹ *Snyder v. Norris*, 6 Blackf. (Ind.) 33.

² *Woods v. Kessler*, 93 Ind. 356. In this case, plaintiff, after getting the property, made default and the case was never tried on its merits.

³ *Smith v. Lisher*, 23 Ind. 500; *Denny v. Reynolds*, 24 Ind. 248; *Carr v. Ellis*, 37 Ind. 465; *Landers v. George*, 49 Ind. 309.

⁴ *Smith v. Mosby*, 98 Ind. 445.

⁵ *Hale v. Fitch*, 8 Pa. St. 495.

⁶ *O'Neal v. Wade*, 3 Ind. 410.

it was pleaded that after the replevin suit was instituted, and before a trial one of the defendants in that suit had carried away the property replevied, and converted it to his own use. *Held*, that this matter should have been pleaded to the replevin suit.¹

§ 1375. **Satisfaction, no judgment, and release are all good defenses.** Where a suit in replevin is compromised and settled by the parties, and dismissed accordingly, no suit can be maintained on the replevin bond.² Where for any reason the judgment in replevin is not in force, it is a proper defense to an action on the bond for failure to comply with that judgment.³ It is a good defense to a suit on a replevin bond that after the commencement of the suit in replevin another party was substituted as defendant therein, and that the present defendant was released from all liability therein, and has been fully paid by said substituted defendant for his interest in the property, and has not been damnified by the result of that suit.⁴ No recovery can be had against the sureties on a replevin bond running to three defendants who disclaimed any interest in the property, and where another person was on motion substituted as defendant after the giving of the bond.⁵

§ 1376. **That the property has been eloiigned or ceased to exist or died—How far a defense.** It is a good defense to an action on a replevin bond that the sheriff was notified to retain the property in his custody, but that he delivered the possession thereof to a stranger who eloiigned it from the state.⁶ Where an order for return has not been complied

¹ *Buckmaster v. Beames*, 9 Ill. (4 Gilm.) 443.

² *Gerard v. Dill*, 96 Ind. 101. This decision is placed upon the ground that it would be unjust to allow defendant in replevin to bring an action on the bond and allege as a breach of the bond the very facts which he had stipulated for in an amicable agreement of compromise.

³ *Blackburn v. Crowder*, 108 Ind. 238 (9 N. E. 108).

⁴ *Vinton v. Mansfield*, 48 Conn. 474.

⁵ *Williams v. St. Louis, I. M. & S. Ry.*, 8 Mo. App. 135.

⁶ *McRae v. McLean*, 3 Port. (Ala.) 138.

with and suit is brought on the bond, defendants may show in mitigation of damages that since the taking under the writ the property in whole or in part has ceased to exist, the question being the actual damage to the plaintiff or those he represents.¹ If a live animal be replevied and there is judgment of *retorno habendo*, it is a good plea to a suit on the replevin bond that the animal died without the defendant's fault.² Where the plaintiff acted honestly in a belief of right he has usually been released by the death or destruction of the property clearly without his fault, but the contrary rule has usually been followed in all cases where he was a trespasser *ab initio*. See Chap. XXX.

§ 1377. **That it cannot be returned is no defense.** It is no defense in an action upon an undertaking in replevin that the property is in such position that it cannot be reached; the undertaking can only be satisfied by a redelivery of the property or by payment of the judgment.³

§ 1378. **What may be shown in mitigation of damages.** We have seen what may be shown to defeat a recovery; let us now see what may be shown in mitigation of damages. A slight examination of the authorities will prove that this is merely a question of the amount of the damages. Many things may be shown and considered by the court in determining the just amount for which judgment should be rendered, which would not be allowable in bar of the action on the bond. A little thought will show us that this is a right and necessary rule. A person who has signed a bond by which another's property has been wrongfully torn from him, can not be heard to say he is not liable at all, but can show that his liability is much less than the penalty named in the bond. Otherwise great injustice might be done in the assessment of the amount of recovery. In the application of this rule the courts have not always distinguished

¹ Tuck v. Moses, 58 Me. 461.

² Carpenter v. Stevens, 12 Wend. (N. Y.) 589.

³ Harrison v. Wilkin, 78 N. Y. 390.

clearly between a defense pleaded in bar, and the same defense pleaded in mitigation of damages, and this inattention to legal distinction has led to some confusion and a lack of uniformity in the decided cases.

§ 1379. **Rule against a stranger to the title is more strict** than against one who in good faith thought he had a title or interest in the property in question. "Where the defendant in the replevin suit succeeds and sues on the replevin bond for the value of the property, the defendant cannot show, in mitigation of damages, that the right to the property was in himself; but he can show that the plaintiff's title was of short duration, and was terminated soon after the judgment in the former suit. But if the action is against a mere stranger, the rule would be different; and in such a case the plaintiff who holds the property by virtue only of some lien should recover the full value."¹

§ 1380. **Matters in mitigation of damages—Illustrations.** It may be shown in mitigation of damages in an action upon the bond, that the original action failed merely because it was prematurely brought,² and in an action upon the bond for a breach by one of the owners of the replevied property, he can only recover to the extent of his interest.³ It may also be shown in mitigation of damages that since the taking by virtue of the writ, the interest of the plaintiff in the suit on the bond has in whole or in part terminated.⁴ If the suit on the bond is by the defendant in the original suit, the defendant in the suit on the bond may show that the interest of the plaintiff was merely that of a levy, and

¹ Field on Damages, § 837; *Fallon v. Manning*, 35 Mo. 271; *Frei v. Vogel*, 40 Mo. 149. See *Sutcliff v. Dohrman*, 18 Ohio, 181 (51 Am. Dec. 450); *Glann v. Younglove*, 27 Barb. 480; *Rockwell v. Saunders*, 19 Barb. 473; *Tiedman v. O'Brien*, 36 N. Y. Sup. Ct. 539; *Tracy v. Veeder*, 50 Barb. 70 (35 How. Pr. 209).

² *Davis v. Harding*, 3 Allen (Mass.), 302.

³ *Bartlett v. Kidder*, 14 Gray (Mass.), 449.

⁴ *Tuck v. Moses*, 58 Me. 461.

that the execution has been satisfied.¹ Where goods were levied on for a debt of a copartner, and were replevied by his copartner, who was defeated on the ground of the copartnership, and the affairs of the copartnership had not been wound up, and suit was brought on the replevin bond, defendants were allowed to show the insolvency of the copartnership in mitigation of damages.² Property in the plaintiff in an action of replevin is no defense to an action on the bond, but the fact goes in mitigation of damages. The sureties on the bond are estopped from denying the recital of value in the bond, and such recital is sufficient evidence of the value of the property.³ Where property owned by several was levied on by process against one only, and the others replevied and sold the property and judgment went against them, *held*, that in a suit on the bond they could, in reduction of the damages, show the extent of their undivided interest, as the replevin suit only decided that the officer was entitled to hold possession and sell whatever interest the defendant in execution had in the property, and that suit on the bond could not be enjoined.⁴ Where the party plaintiff shows a judgment in his favor in the replevin suit uncomplished with, he is at least entitled to nominal damages and costs of his suit on the bond.⁵

§ 1381. **That the plaintiff has been partly paid in another proceeding is a defense pro tanto.** Where attached goods were replevied, the plaintiff failed in the replevin suit and judgment was also rendered against him in the attachment proceedings on which execution was issued, and levied on the same goods, and an action was also brought against the sureties on the replevin bond. *Held*, that in the suit

¹ Heyden v. Anderson, 17 Iowa, 158; Buck v. Rhodes, 11 Iowa, 348.

² Hacker v. Johnson, 66 Me. 21.

³ Wiseman v. Lynn, 39 Ind. 250; Trimble v. The State, 4 Blackf. 435; May v. Johnson, 3 Ind. 449; Guard v. Bradley, 7 Ind. 600; Sammons v. Newman, 27 Ind. 508; The German M. Ins. Co. v. Grim, 32 Ind. 249.

⁴ Safford v. Gallup, 53 Vt. 291; Leonard v. Whitney, 109 Mass. 265.

⁵ Crabbs v. Koontz, 69 Md. 60 (13 A. 591).

on the bond the sureties were entitled to have the proceeds of the sale of the goods first applied in discharge of their liability on the replevin bond, and that the right to have them so applied constituted to that extent an equitable defense to the action.¹ Sureties on a replevin bond conditioned to return the property that had been held by the sheriff under attachment, may show in mitigation of damages that the demand on which the attachment was taken out had been afterward paid, or that the sheriff had again taken it and sold it on other writs. Sureties on a replevin bond are not parties to the action in replevin, and have no control over it.² That the costs have been collected on execution is no defense to the main action on the bond for the property or damage, other than assessed costs.³

§ 1382. **The same.** In a suit on the redelivery bond it is no defense that, pending the replevin action, the property was turned over to a receiver of the defendant in that action; but it would have been a good defense to the replevin action. Where it appears that the money which the property brought at receiver's sale was claimed by the plaintiff and part of it paid to him by the court, this may be shown in mitigation of damages on the bond.⁴ In a suit upon a replevin bond for failure to return property, where the replevin case was not tried on its merits, and where defendant claims title by purchase under an execution sale, it is necessary, in order to support such title for defendant, to prove a valid judgment and an execution issued thereon. The fact that the plaintiff in this action has received the proceeds arising from a constable's sale of the goods replevied does not estop him from recovering damages for a failure to return the property; but the amount so received should be deducted from the judgment for the value of the property recovered in this action.⁵

¹ *Struman v. Robb*, 37 Iowa, 311.

² *Lindner v. Brock*, 40 Mich. 618.

³ *Kafer v. Harlow*, 5 Allen (Mass.), 348.

⁴ *Boyd v. Huffaker*, 39 Kan. 525 (18 P. 508).

⁵ *Ledford v. Weber*, 7 Bradw. (Ill.) 87.

§ 1383. **Set-off may be allowed in suit on bond.** In an action on a replevin bond a surety thereon, who has become owner of a judgment under which a valid levy was made, is entitled to have the amount of the judgment deducted from the value of the replevied property, if the claim was not presented with those upon which the lien was grounded. So, also, property owned by the principal in the bond may be deducted though included in the lien, if it had not belonged to the execution defendant and had gone to a *bona fide* holder. But it cannot be shown as a defense that property already adjudged to belong to the principal in the bond was really only held by him to sell on commission.¹ Damages against an officer personally for a false return in an attachment proceeding cannot be recouped against damages recovered by him on the replevin bond for replevin of the attached property; such damage he holds in trust for those he represents.² In law defendants sued on a replevin bond are not entitled to set off an indebtedness due from the plaintiff to their principal; but in the present temper of the law and of the courts for reaching the merits of a litigation, it seems that insolvency of the plaintiff is a sufficient ground for the allowance of a set-off existing in favor of the principal against the plaintiff, and this equitable right is strengthened where the principal also is insolvent.³ There is no reason on principle why set-off or recoupment should not be allowed in suit on bond in replevin as fully as in any other form of action.

§ 1384. **Illustrations of matter not allowed to be shown in mitigation of damages.** In a suit on the replevin bond the bondsmen will not be allowed to introduce evidence to show the plaintiff to have been but a part owner of the property replevied in order to reduce the damages.⁴ If but a

¹ Henry v. Ferguson, 55 Mich. 399 (21 N. W. 381).

² Mattoon v. Pearce, 12 Mass. 406.

³ Coffin v. McLean, 80 N. Y. 560; Smith v. Fellon, 43 N. Y. 419; Balsley v. Hoffman, 13 Pa. St. 603.

⁴ Williams v. Vail, 9 Mich. 162.

part owner he would have a better right than defendant. In a suit on a replevin bond, where the plaintiff had become nonsuit, the defendant cannot show property in the plaintiff in replevin in reduction of damages.¹ In an action on a replevin bond the defendant cannot question the constitutionality of the statute under which the bond was executed.² A partner having wrongfully obtained possession of firm property by replevin, cannot urge the partnership character of the goods in mitigation of defendant's damages in a suit on the bond.³

§ 1385. **Evidence in certain cases—Illustrations.** It is error, in an action on a replevin bond, to refuse to let the plaintiff prove that the property has not been returned, as the condition of the bond requires.⁴ This is the very gist of plaintiff's case. In a suit on the bond the plaintiff must prove the return of an execution unsatisfied, in whole or in part, though the plea of *non est factum* alone be interposed.⁵ There is no liability on a replevin bond without proof of execution in the action, and its return no property; the judgment in replevin should also be put in evidence.⁶ Where the suit was abated, through no fault of the plaintiff, and there is no proof that the property was delivered to him or that he detained it after the abatement, judgment against him on the bond can not be sustained.⁷ A sheriff's return that no replevin bond was given is conclusive and defeats an action upon an alleged bond.⁸

§ 1386. **The judgment and pleadings in the replevin**

¹ *Smallwood v. Norton*, 21 Me. 83.

² *Weaver v. Field*, 1 Blackf. (Ind.) 334.

³ *Clapham v. Crabtree*, 72 Me. 473.

⁴ *Smith v. Pries*, 21 Ill. 656.

⁵ *Cowdin v. Stanton*, 12 Wend. (N. Y.) 120.

⁶ *Phillips v. Waterhouse*, 40 Mich. 273; *Williams v. Vail*, 9 Mich. 162. The Michigan statute requires that an attempt to collect on execution must be made before the sureties are liable.

⁷ *Kidder v. Merryhew*, 32 Mich. 470.

⁸ *Green v. Kindy*, 43 Mich. 279 (5 N. W. 297).

case are competent evidence in the suit on the bond and are *prima facie* evidence that there was such a suit, that the property was taken, what was done with it, in some cases of the value and of the final result; in the absence of other evidence they are conclusive on all these points, but if contradicted, are only *prima facie*. In an action on the bond the papers in the replevin suit are proper evidence.¹ When the bond recites the gross value of the property replevied, such recital may be evidence of the value of all the articles mentioned collectively. But if a portion of the property has been returned according to the conditions, such recitals afford no evidence of the value of the remainder which has not been returned.² The value of the property recited in the bond is competent, and if uncontradicted, sufficient evidence against the obligors of the value of the property;³ but it is not conclusive.⁴ The officer's return and the appraisal in the action of replevin were not evidence of the value of the property against the defendant in replevin, now plaintiff, who had no part in procuring the appraisement to be made.⁵ But any witness of competent knowledge may testify to the value of the property.⁶ In an action upon an appeal bond, entered into by a defendant in replevin, against whom there was a final judgment for a return, *held*, on an inquiry of damages that the plaintiff might give in evidence the value of the goods replevied; that the record of the replevin was proper evidence to identify them, and that the appraisement was *prima facie* evidence of their value.⁷

¹ *Ginnis v. Hart*, 6 Iowa, 204; *Stevison v. Earnest*, 80 Ill. 513.

² *Sopris v. Lilley*, 2 Col. 496. See *Rigg v. Parsons*, 29 W. Va. 522 (2 S. E. 81).

³ *Wright v. Quirk*, 105 Mass. 44; *Parker v. Simonds*, 8 Met. 205.

⁴ *Clap v. Guild*, 8 Mass. 153; *Mattoon v. Pearce*, 12 Mass. 406.

⁵ *Kafer v. Harlow*, 5 Allen, 348; *Leighton v. Brown*, 98 Mass. 515.

⁶ *Vandine v. Burpee*, 13 Met. 288; *Commonwealth v. Dorsey*, 103 Mass. 412. The rule in Massachusetts is to enter judgment for the full penalty of the bond, but issue execution for only so much of the penal sum as is due and payable in good conscience.

⁷ *Karthauss v. Owings*, 2 Gill. & J. (Md.) 430.

§ 1387. **A party in his suit on the bond must occupy a position consistent with his position in the replevin suit.** Where, in an action of replevin, defendant successfully defends on the ground of coverture, a judgment cannot be rendered in her favor against the plaintiff and his sureties on the replevin bond.¹ In a suit on a replevin bond defendant can not allege that no demand for a return was made, unless he also offer to return the property; neither can he show that the property belonged to another and he could not return it; nor can he defend on the ground that the verdict and judgment in replevin are not full and complete.² The object of a replevin bond is not merely to indemnify the officer, but to furnish an additional remedy and security to the defendant in case plaintiff fail to sustain his action; and where possession of property is obtained on replevin before a justice, the plaintiff in that suit insisting that he had jurisdiction, even if the justice had not jurisdiction of the subject-matter (rails in a fence), the obligors in the replevin bond will be estopped from urging such fact in defense in a suit on the bond.³ The change by the plaintiff of an action of replevin brought to recover goods, alleged to have been obtained by fraud, to an action of assumpsit, operates to affirm the sale as to all the goods in question, and the plaintiff cannot thereafter defend an action on the replevin bond on the ground of fraud in the purchase of the goods.⁴ When judgment has been given for joint defendants, plaintiffs, when they are sued on the bond, cannot allege that one only owned the property, and so support a counter-claim against him.⁵

¹ Durning v. Waddingham, 12 Mo. App. 145.

² Robbins v. Foster, 20 Mo. App. 519; Nelson v. Luchtemeyer, 49 Mo. 56; Sweeney v. Lomme, 22 Wall. 208.

³ Fahnestock v. Gilham, 77 Ill. 637; Petrie v. Fisher, 43 Ill. 442; Bates v. Williams, 43 Ill. 494; Shaw v. Havekluft, 21 Ill. 127; Smith v. Whitaker, 11 Ill. 417.

⁴ Horner v. Boyden, 27 Ill. App. 573. He cannot affirm as to part and rescind as to another part. Benjamin on Sales, §§ 433, 442; Conihan v. Thompson, 111 Mass. 270; Hanchett v. Riverdale, 15 Ill. App. 57; Barhydt v. Clark, 12 Ill. App. 647.

⁵ Ringgenberg v. Hartman (Ind.), 20 N. E. 637.

§ 1388. **A return to be a full defense must fully comply with the order of the court.** A return of the goods to the sheriff is no answer to an action on the replevin bond. The return required by the bond is a return to the party from whom taken, in pursuance of the judgment of the court, not a mere redelivery to the sheriff.¹ Where the judgment in a replevin suit is for the defendant, for the return of the property and costs, it is no defense to a suit on the bond that the plaintiff in replevin returned the property. The failure to prosecute the replevin suit with success renders the obligors liable at least to nominal damages.²

§ 1389. **A return of part of the property is a defense pro tanto.** The plaintiff in a replevin suit is bound to accept an offer to return a substantial part of the property replevied, and such offer is a defense *pro tanto* to a suit for damages for a non return.³ A attached certain property, including a horse. C replevied it, but ultimately failed in his action, and judgment was rendered for a return, damages and costs. All the property was accordingly returned except the horse, which, during the pendency of the two suits, died, without the fault or negligence of any one; *Held*, in a suit on the replevin bond, that C was not liable for the value of the horse.⁴

§ 1390. **New title acquired since the bond was given and before the judgment in replevin no defense. Res adjudicata.** Where property levied on by virtue of an execution is replevied, and the issue is title to the property, and judgment of return to defendant, the plaintiff cannot afterward defend a suit on the bond, for a failure to return the property, by asserting a new title to the property acquired after the bond in replevin was given, and before judgment for a return. The judgment in replevin is final and conclu-

¹ Gould v. Warner, 3 Wend. (N. Y.) 54.

² Crabbs v. Koontz, 69 Md. 60 (13 A. 591).

³ Harts v. Wendell, 26 Ill. App. 274.

⁴ Melvin v. Winslow, 10 Me. (1 Fairf.) 397.

sive as to all issues. properly triable under the pleadings in that action.¹

§ 1391. **Effect of a return after suit brought on bond.** Where, in replevin proceedings, the plaintiff is awarded a return of the property, it must be returned without demand; but if it be returned after suit is brought on the bond, this fact should be considered at the trial in mitigation of damages.² It is a good defense to an action on a replevin bond that the defendant had surrendered all the property replevied, except a part which was missing, and that, instead of the latter, other and more valuable articles of the same description had been delivered to plaintiff, who had accepted the same:³—on the theory that, if there is no actual damage, plaintiffs could at the most only recover nominal damages. A different ruling was made in a case on a supersedeas bond, where it was *held* not permissible to show in defense that there had been a recaption of the property in dispute by one in the interest of the plaintiff in replevin.⁴ But the rule followed in *June v. Payne*, *supra*, is the proper one.

§ 1392. **It is a good defense that plaintiff had the possession of the property, and that it was for that reason impossible to literally comply with the order.**⁵ It is a good defense in an action on a replevin bond, to recover the value of the property replevied in default of its return, to show that the plaintiff had taken such property into his possession by other process prior to judgment in the replevin suit. A

¹ *Carr v. Ellis*, 37 Ind. 465; *Wallace v. Clark*, 7 Blackf. 298; *Davis v. Crow*, 7 Blackf. 129; *Sherry v. Foresman*, 6 Blackf. 56; *Smith v. Lisher*, 23 Ind. 500; *Denny v. Reynolds*, 24 Ind. 248; *Whitney v. Lehner*, 26 Ind. 503; *Abdil v. Abdil*, 33 Ind. 460.

² *June v. Payne*, 107 Ind. 307 (7 N. E. 370).

³ *Sands v. Fritz*, 84 Pa. 15. This was replevin for marble in a marble yard, and the yard appears to have been run and marble sold out and other put in in its place while the suit was pending.

⁴ *Buck v. Collins*, 69 Me. 445.

⁵ *Barnett v. Selling*, 3 Abb. New Cas. 83; *Nosser v. Corwin*, 36 How. Pr. 540.

plaintiff cannot have the property and a judgment against the sureties for its value at the same time.¹

§ 1393. **Damages for failure to return should be recovered from the replevin, and not from the appeal bond.** In replevin, where plaintiff in justice's court failed to appear, and judgment went against him and a *retorno habendo* was awarded, and he appealed and gave the ordinary appeal bond, and the appeal so taken was dismissed, and judgment of *retorno habendo* was awarded, in order to recover damages for not making return of the property replevied, suit should be brought on the replevin-bond and not upon the appeal bond.²

§ 1394. **In an action for the malicious prosecution of a replevin suit,** evidence of the commencement of successive suits by the defendant upon the same groundless claim, is admissible to show malice. The damages recoverable in such an action include all the loss which the plaintiff sustained in his business as the direct and natural result of that suit, and all the expenses incurred in defense, including counsel fees. Taxable costs would be no compensation.³

¹ Demers v. Clemens, 2 Mont. 385; Lomme v. Sweeney, 1 Mont. 584; Caldwell v. Gans, 1 Mont. 570.

² Kautzler v. Albertson, 18 Bradw. (Ill.) 313.

³ Magmer v. Renk, 65 Wis. 364 (27 N. W. 26). In this case replevin was brought for a top wagon, harness, etc., with which defendant in replevin, who was a baker, delivered his bread, upon a chattel mortgage which plaintiff had, but for which he had paid nothing. The jury found that he did not act in good faith, but wilfully and maliciously and with intent to injure the defendant in replevin.

INDEX OF CASES CITED.

REFERENCES ARE TO PAGES.

A.		PAGES.
A. & P. R. R. Co. v. Chino.....	171	
Abbey v. Searls.....	696	
Abbott v. Ziegler	360	
Abbotts v. Barry	131	
Abdil v. Abdil	808	
Abeel v. Van Gelder	554	
Aber v. Bratton.....	39, 478	
Abrams v. Jones.....	332, 706	
Abren v. Brown	690	
Acker v. Campbell.....	131, 133, 267	
v. Finn.....	747	
v. White.....	373, 375, 669	
Ackerman v. King.....	773, 777	
Ackley v. Finch	87	
Ackworth v. Kemp	319, 337	
Adams v. Adams.....	576	
v. Broughton.....	668	
v. Champion.....	635	
v. Corriston, 184, 284, 285,	289	
v. Davis.....	170	
v. Goddard.....	587	
v. Hubbard	404, 428	
v. McGlinchy	347, 634	
v. Smith	139	
v. Wildes, 99, 212, 250, 419		
v. Wood	15, 661	
Addison v. Overend	630	
Adkison v. Hardwick.....	193	
Adriance v. Rutherford.....	42	
Adridge v. Harper	761	
Affild v. The People.....	741	
Afflerbach v. McGovern.....	283, 656	
Ahlman v. Meyer.....	683	
Aireton v. Davis.....	335	
Alabama Bank v. Barnes.....	59	
Albright v. Brown.....	235	
Alden v. Carver.....	52, 57, 58, 257	
Alderman v. Manchester.....	614, 650	
Aldrich v. Reynolds.....	182	
Alexander v. Burnham.....	341	
v. Southey.....	260	
Alford v. Bradeen.....	120	
Allaire v. Whitney.....	527	
Allen v. Agnew	27	
v. Butman.....	532, 661	
v. Crary, 31, 151, 233, 256,	337, 342, 343, 423	
v. Darby	645	
v. Dykers.....	522	
v. Ford.....	136	
v. Fox, 382, 457, 460, 467,	469, 471, 473, 475, 476,	
477, 478, 479, 482, 497,	675	
v. Judson, 96, 348, 457, 458,	540, 541	
v. Kennedy.....	92	
v. Miller.....	164	
v. Smith	56, 70	
v. Staples.....	147, 156	

	PAGES.		PAGES.
Allen v. Taylor.....	48	Angell v. Rosenbury	568
v. Van Ostrand.....	178	Anon, 2 A. T. K.....	4
v. White.....	224	Dyer.....	452
v. Woodford...720, 783, 794		Antrim v. Gilson	236
v. Wright.....	95	Applegate v. McClurge's Heirs	554
Allis v. McLean.....	478, 542	Appleton v. Barrett, 253, 261, 600,	
Allison v. Chandler.....	478	602, 613, 706	
v. Matthieu...132, 133, 221		Applewhite v. Allen, 292, 302, 303,	
Allred v. Bray	542	439	
Alsayer v. Close.....	484	Archebeque v. Miera.....	668
Alvord v. Haynes.....	231	Archer v. Hale.....	692, 761
Alwood v. Ruckman, 19, 21, 297,		Arendale v. Morgan.....	215, 218
398		Armbruster v. Wilson.....	177
Am. Exp. Co. v. Parsons.....	483	Armel v. Layton.....	665
American Tool Co. v. Smith ...	170	v. Lendrum.....	148, 685
Amery v. Delamere.....	71, 80, 523	Armistead v. Bernard.....	149
Ames v. Mississippi Boom Co., 14,		Armry v. Delamirie.....	69
45, 209, 292, 293		Armstrong v. Burrell.....	357
Amory v. Flynn.....	45	v. McMillan...401, 430	
Amos v. Dougherty	135	Arn v. Parker.....	567
v. Sinnott, 42, 313, 394,		Arnold v. Allen	353, 765
395, 406, 767		v. Bailey.....	784
Anchor Milling Co. v. Walsh, 476,		Arosemena v. Hinckley	128
477, 550		Arter v. The People, Use &c., 354,	
Anderson v. Dickerson.....	733	741	
v. Dunn.....	397, 400	Arthur v. Gale.....	553
v. Hopler, 195, 198, 279		v. Wallace...264, 367, 601	
v. Lane.....	608	Arundel v. Trevil	49
v. McLeod.....	656	Asbell v. Tipton.....	389, 658
v. Mills.....	431	Ascher v. Schaeper.....	529, 559
v. O'Laughlin	609	Ash v. Putnam, 130, 131, 132, 217	
v. Straub	183	v. Mathes	581
v. Strauss	182	Ashby v. West.....	400
v. Talcott, 391, 411,		Ashley v. Peterson.....	759
550, 564, 565		Ashmun v. Williams.....	186, 192
v. Tyson	458, 632	Ashton v. Touhey	598
v. Wehe.....	299	Astley v. Capron	577
v. Worley.....	175	Atherton v. Fowler.....	468, 469
Andrew v. Cox.....	123, 207	Atkins v. Barwick	217
v. Dieterick	132	v. Burnes	392
Andrews v. Baker.....	710	v. Moore, 537, 540, 546,	
v. Costican	66, 467	745, 781	
v. Shattuck	258	v. Womeldorf.....	21
v. Smith	570	Atkinson v. Foxwothy	779
Angell v. Keith.....	149	Atlantic R. R. Co. v. Cleino....	168

	PAGES.
Ator v. Rix.....	643, 654, 570
Auberry v. Fiske.....	106
Auerbach v. Marks.....	766
Augier v. Ash.....	349
Auld v. Kimberlin, 286, 287, 306, 407, 705	
Aultman v. Mallory.....	135
v. Reams.....	683
v. Steinan.....	332, 500
v. Stickler.....	399, 532
Austice v. Holmes.....	306, 397
Austin v. Craven.....	205
v. French.....	442
v. Holt.....	194
v. Moore.....	775
v. Secrest.....	654
v. Thompson.....	554
v. Townes.....	750
Austin's Exrs. v. Jones, 441, 464, 465	
Axford v. Perrett.....	354, 717
Ayres v. Hewitt, 129, 131, 247, 267	

B.

Babb v. Talcott.....	420, 422
Babcock v. Ashmead.....	350
v. Gill.....	204
v. Trice.....	421
Babe v. Coyne.....	566
Bach v. Tuck.....	583
Bache v. Proctor.....	738
Bacon v. Cropsey.....	337
v. Davis.....	18, 39, 40, 49
v. Robson.....	245
Badger v. Phinney, 10, 14, 69, 134, 230, 257, 258	
Badlam v. Tucker, 148, 355, 358, 716, 721, 759	
Baer v. Martin.....	229, 358, 549
Bagley v. Bolis.....	429
Bailey v. Boyne.....	401
v. Burton.....	96
v. Colby.....	107
v. Ellis.....	287

	PAGES.
Bailey v. Long.....	97
v. Shaw.....	521
v. Swain.....	399
v. Troxell.....	58, 312
Bain v. Clark.....	388, 390
Baird v. Porter.....	390
v. Taylor.....	647
Baiter v. The People.....	618
Baker v. Campbell.....	35, 66
v. Cardwell.....	289
v. Dailey.....	331, 439, 460
v. Drake, 513, 521, 528, 541, 542	
v. Dubois.....	281, 293, 384
v. Fales, 48, 52, 57, 69, 230	
v. Harper.....	691
v. Howell.....	189, 193
v. Kelly.....	554
v. Phillips.....	353, 682
v. Pope.....	365, 733
v. Washington.....	224
v. Wheeler, 120, 206, 488, 509, 523	
Baldwin v. Burrows.....	410, 603
v. Cash.....	14
v. Cole.....	247
v. Whittier.....	352
Bales v. Scott, 288, 291, 458, 632	
Ballard v. Burgett.....	127
Ballou v. Jones.....	442
v. O'Brien, 247, 248, 251, 270	
Balsley v. Hoffman, 370, 717, 718, 722, 762, 765, 784, 795, 803	
Baltimore Ins. Co. v. Dalrym- ple.....	512
B. & M. R. R. v. Young Bear, 398, 410	
Bancroft v. Blizzard.....	252
Banfield v. Haeger.....	310
Bank v. Blye.....	624
v. Corrollton.....	111
v. Hall.....	679, 720, 778
v. National Bank.....	313

	PAGES.		PAGES.
Bank v. Reese.....	525	Bassett v. Brown	137
Bank of Toledo v. Shaw	76	Batchelor v. Walburne.....	15, 281
Banks v. Angell.....	28	Bates v. Buchanan, 455, 456, 604,	
v. Bowen	600	652	
Barbour v. White, 92, 226, 333, 630		v. Conkling.....	248
Bardwell v. Stubbett, 279, 305, 550		v. Nellis	26
Barhydt v. Clark	806	v. Schoonover	729
Barker v. Green.....	335	v. Snider.....	540
v. Stacey	93	v. Stanton.....	106, 107
Barksdale v. Appleberry, 458, 465		v. Wiggins.....	59, 98
Barmon v. Clippert.....	436	v. Wilbur.....	96, 594, 598
Barnes v. Bartlett, 113, 114, 326,		v. Williams.....	806
467, 513		Bates Co. Bank v. Owen.....	375
v. Gardner.....	259	Bath v. Ingesoll	686
v. Martin.....	151	v. Miller.....	661
v. Tannehill, 178, 309, 398		Battis v. McCord.....	604, 706
Barnett v. Selling.....	41, 47, 808	v. Hamlin, 78, 150, 343,	
v. Thompson.....	522	534, 539, 540, 613, 695	
v. Timberlake	88	Bayard v. Jones.....	52
Barney v. Brannon	9, 422, 654	Bayless v. Lefaiivre, 51, 71, 78, 178	
v. Braunson	57	Beach v. Botsford	404, 428, 570
v. Douglas, 338, 478, 481,		v. Derby	292
535		v. Schmultz	212
Barr v. Hughes.....	391, 461	Beals v. Guernsey	468, 471
Barret v. Scrimshaw	68	Bean v. Hubbard	150, 152
v. Hall.....	621	Beatty v. Brown	199
v. Turner	57, 64	Beaumont v. Greathead.....	527
v. Warren, 10, 132, 144,		Beazley v. Mitchell	215
246, 251, 264		Becker v. Becker	687
Barron v. Cobleigh	212	v. Dupree.....	507
v. Lands	60	v. Kilgore.....	88
Barruel v. Irwin	382, 686	v. Vandercook	255
Barry v. Bennett.....	523	Beckwith v. Phillips.....	55, 141, 289
v. O'Brien.....	68, 565, 639	v. Philoe.....	598
v. Rogers	112	Bedault v. Wales.....	131
v. Sinclair.....	356, 358	Bedford v. Penney	433, 637
Bartels v. Arms.....	69, 250	Beebe v. De Baum	306, 555
Bartlett v. Brickett, 48, 223, 410,		Beecher v. Derby Bridge Co.....	499
467, 654		Beemis v. Wylie.....	598, 629
v. Goodwin	53, 118	Beer v. Wuerpul	147, 697, 698
v. Kidder, 485, 674, 781,		Beers v. St. John.....	186
800		Belcher v. Van Duzen	117
Basford v. Mills.....	576	Belden v. Laing, 52, 86, 415, 698,	
Bass v. Irvin.....	618	416, 431, 696, 697	
Bassett v. Armstrong.....	68, 109	Belk v. Broadbent.....	338

	PAGES.
Belkin v. Hill.....	660
Bell v. Bartlett, 453, 463, 695, 701,	702
v. Campbell	469, 473, 479
v. Hogen	118
v. Judge, &c	328
v. Matheny.....	63
v. Monahan.....	54
v. Pharr	87, 465
v. Thomas.....	356
Bells v. Kinson.....	157
Beloit v. Morgan.....	663
Belt v. Worthington.....	358, 795
Bemus v. Beekman, 455, 598, 602,	644, 647, 653
Benesch v. Waggner.....	370
Benjamin v. Stemple	539, 540
Benner v. Peiffer	123
Bennet v. Butterworth	606
Bennett v. Allen	352, 354, 358
v. Berry	321
v. Hollown.....	396
v. Hood.....	498, 663, 774
v. Lockwood, 498, 508,	510
v. McGrade	748
v. Schuster, 75, 234, 555	
Bensley v. McMillan	397
Bent v. Bent, 200, 249, 349, 352	
v. Steinburg.....	663
Bercich v. Marye.....	483
Berger v. Clippert.....	568
Bergesch v. Keevil.....	53, 293, 303
Berghoff v. Hickwolf, 355, 453,	682, 684, 717, 718
v. M'Donald	228, 229
Bern v. Mattaire.....	290
Bernal v. Hovious.....	110
Berrien v. Westervelt.....	279, 282
Berry v. Berry.....	35
v. Dwinel.....	526
v. Hoeffner.....	675
v. O'Brien.....	682
v. Wilson.....	584
Berson v. Nunan	635

	PAGES.
Berthold v. Fox, 57, 458, 465, 469,	471, 506, 512, 515,
	626, 706
v. Holman.....	183, 394
Bertwhistle v. Goodrich.....	250
Bessell v. Drake.....	48
Bethea v. McLennon	441, 465
Bettis v. Bailey	740
v. Taylor	465
Betts v. Lee	204, 206, 493
Beveridge v. Welch, 497, 510, 538	
Bick v. Reeso	359, 501
Bidault v. Wales.....	133
Biddle v. Parke	446
Bigelow v. Comegys, 741, 743, 766,	792
v. Doolittle, 456, 467,	476, 471, 708
Bilbo v. Henderson	168, 169
Bildersee v. Adin.....	738
Bill v. Campbell	585
Billings v. Tucker	105
v. Thomas.....	344
Bills v. Kinson	176
v. Vose.....	447
Bingham v. Hill	309
v. Morrow.....	281
Binsted v. Buck.....	255
Birks v. French	73
Bisbee v. Fadden.....	62
Bispham v. Taylor	334
Bissell v. Hopkins.....	468
Black v. Black.....	76, 606, 670
v. Foster	556
v. Winterstein, 528, 531,	533, 624
Blackburn v. Crowder.....	734, 798
Blacket v. Cressop	722
Blackie v. Cooney	469, 471, 605
Blackman v. Wheaton.....	410
Blackwell v. Acton.....	498, 499, 647
v. Ator.....	780
v. Hunt.....	319
Blair v. Ray	348
Blake v. Darling.....	326

	PAGES.		PAGES.
Blake v. Everett.....	554	Bolon v. O'Brien.....	241
v. Groves.....	571	Boly v. Griswold, 633, 645, 646,	793
v. Powell.....	574, 607	Bond v. Mitchell, 284, 297, 311,	314
Blakely v. Duncan.....	606	v. Padelford.....	51, 75
v. Patrick.....	44	v. Patterson.....	768
Blakeslee v. Rossman.....	404, 595	v. Ward.....	247, 252
Blakir v. Sands.....	412, 426, 440	Bonner v. Coleman, 453, 455, 644	
Blanchard v. Child, 244, 265, 267,	701	Bonsted v. Orvis, 467, 482, 506,	512, 541
Blanche v. Bradford.....	389	Bonney v. Smith.....	699
Blatchford v. Boyden, 229, 231,	679, 742, 745, 746	Bonsall v. Comly.....	7, 29, 152
Blessing v. Rice.....	267	Boody v. Keating.....	216
Blevin v. R. R. Co.....	106	Booker v. Jones.....	99
Bliss v. Badger.....	17, 408	Boom v. St. Paul, &c.....	683, 718
v. Whitney.....	190	Booth v. Ableman, 163, 403, 434,	451, 458, 470, 533, 538,
Blizzard v. Walker.....	178	541, 613	
Blobaum v. Gambs.....	537	Borse v. Thomas, 314, 401, 469,	565, 566
Bloodworth v. Stevens.....	421	Bosley v. Farquar.....	331
Bloomer v. Craig.....	432	Bosseker v. Cramer.....	601
v. Juhel.....	388, 447	Bostick v. Brittain.....	56, 583, 708
Bloomingdale v. Chittenden...	283	v. Buttam.....	113
Blot v. Boiceau.....	522	Boston & M. R. Co. v. Brown, 271	
Blue Valley Bank v. Bane.....	8, 548	Boston, &c., v. Dana.....	216
Bly v. U. S.....	72, 204, 212	Boston Loan Co. v. Myers.....	477
Blystone v. Burgett.....	93	Bosworth v. Trowbride.....	698
Boardman v. Sill.....	424	Bouchand v. Diaz.....	663
Bobb v. Talcott.....	17	Boughton v. Bruce.....	247, 257, 263
Bobo v. Partton.....	441	Bouldin v. Alexander.....	33, 106
Bodine v. Simmons.....	80	Boulware v. Craddock.....	264
Bodley v. Reynolds.....	510	Bourk v. Riggs, 393, 409, 596,	647, 669, 674
Bofil v. Russ.....	736	Bourne v. Hocker.....	33
Bogan v. Stoutenburg.....	249	Boutelle v. Waren, 9, 88, 141, 422,	433, 534, 654
Bogard v. Jones, 11, 53, 57, 71,	394	Bowen v. Benson.....	88
Bogart v. Burkhalter.....	510	v. Fenner.....	104
v. Phelps.....	341, 568	v. Hutchins.....	232
Bohlen v. Arthurs.....	115	v. Roach.....	115, 183
Boileau v. Rutlin.....	664	v. Schuler.....	131, 133, 136
Boies v. Witherell.....	447	v. Turner.....	250
Boise v. Knox.....	54	Bower v. Higbee.....	194, 198, 200
Bolander v. Gentry.....	158		
Bolen v. Crosby.....	748		
v. Nunn.....	428		
Bolling v. Tate.....	785		

INDEX OF CASES CITED.

817

PAGES.	PAGES.
Bower v. Tallman, 14, 44, 342, 453, 486, 653, 664	Brewster v. Carmichael....198, 456 v. Silliman, 457, 480, 559
Bowman v. Eaton..... 257	Briarly v. Cox.....190, 191
v. Moore..... 762	Brice v. Elliott..... 172
Boyce v. Cannon.....472, 568	Brichman v. Ross.....566, 635
Boyd v. Adams..... 392	Bridge v. Ford..... 742
v. Huffoker.....789, 802	v. Layman....279, 282, 285
v. McAdams.....396, 406	Bridges v. Hawkworth..... 82
v. Moore.....236, 667	Briggs v. Dow..... 601
Boyden v. Frank, 39, 145, 338, 343	v. Gleason.....12, 452
Boyer v. Fowler.....762, 776	v. Humphrey..... 690
Boylston v. Davis.....519, 758	v. Large..... 27
Boynton v. Page..... 116	v. Mason..... 347
v. Warren..... 96	v. Milburn.....660, 665
Brackenbury v. Pell..... 717	v. Wiswell.....327, 357
Brackett v. Bullard..... 93	Bringhurst v. Pollard..... 170
v. Whidden.....168, 391	Brisco v. McElween..... 503
Bradford v. Frederick..... 758	Bristol v. Braidwood..... 573
Bradley v. Fuller..... 572	v. Burt.....209, 242, 255
v. Gamelle.....234, 485	v. Wilsmore, 131, 132, 142 217, 218
v. Halloway..... 337	Britt v. Aylett.....53, 56, 57, 394
v. Michael.....55, 68	Brizee v. Maybee, 477, 480, 496, 503, 505, 508, 524
v. Morse..... 288	Broadwater v. Darne.....16, 42, 66
Bradshaw v. Warner..... 122, 127	Broadwell v. Paradise, 61, 480, 481, 537, 540
Brady v. Whitney.....466, 660	Brock v. Barr..... 428
Bradyall v. Ball.....373, 381	Brockway v. Burnap, 37, 39, 41, 49, 60, 280, 231, 297
Bragdon v. Penny..... 434	v. Kinney..... 602
Bragg v. Massie..... 553	Brockwell v. Saunders..... 57
Brainard v. Jones..... 786	Brommell v. Hart..... 55
Bramwell v. Hart..... 582	Brooke v. Berry.....3, 44, 577
Branch v. Branch, 224, 298, 329, 354, 356, 360, 707, 740	Brookover v. Esterly.....87, 595
v. Morrison..... 193	Brooks v. Shepherd..... 769
v. Wiseman, 110, 399, 402 653	Broom v. Fox..... 682
Brannin v. Bremen, 598, 683, 759	Brothers v. Hurdle.....193, 196
v. Johnson, 478, 510, 542	Brotton v. Clawson..... 184
Branscombe v. Scarborough, 765, 785	Brower v. Goodyer..... 131
Bray v. Saaman.....429, 696	Brown v. Allen.....506, 507
Breckenridge v. Johnson, 155, 159	v. Bemen..... 91
Brennan v. Shinkle.....500, 708	v. Bement..... 87
Brent v. Hagner..... 47	v. Bissett, 337, 387, 391, 571
Brewer v. Fleming.....44, 195	

	PAGES.		PAGES.
Brown v. Brigham	748	Brusley v. Hamilton	107
v. Caldwell	42, 189, 193	Bryan v. Smith	54
v. Campbell	218	v. Spurgin	441
v. Chiopee	6, 55, 562	Bryant v. Hendee	152
v. Compton	337, 338	v. Osgood	38
v. Cook	247	v. The State, 155, 324,	
v. Coon	263	342, 347	
v. Crockett	83	Buch v. Fulton	223
v. Cummings	510	Buchman v. Harney	128, 129
v. Davis	349	Buck v. Colbath, 160, 162, 164,	
v. Emmerson	528	252, 337, 339, 343, 404	
v. Fitch	245	v. Collins	808
v. Fulkerson	716, 768	v. Lewis	752, 792
v. Johnson	440, 466, 646	v. Payne	68
v. Keller	386	v. Remsen	533, 536, 539
v. Parker, 355, 716, 717,		v. Rhodes	664, 801
718, 719, 780, 796		Buckley v. Buckley, 15, 16, 49, 147,	
v. Peevy	432	206, 214, 291, 453, 488,	
v. Poland	243, 303	615, 647, 702	
v. Sax, 193, 203, 204, 291,		Buckmaster v. Beames	778, 798
526		Buel v. Davenport	370, 745
v. Smith, 14, 44, 77, 177,		Buell v. Ball	168, 169, 172, 437
451, 452, 602, 619		v. Schaale	169, 170
v. Stanford	637	Buffington v. Gerrish, 130, 131,	
v. Thomas	225	132, 139, 142, 267	
v. Wallis	188, 190	Bugle v. Meyers	363, 367
v. Webster	576, 645	Bull v. Griswold	198, 202, 487,
Brownell v. Manchester, 51, 75,		509	
148, 223, 224, 481, 769		Bullis v. Montgomery	344
Browning v. Bancroft	131	Bulmer v. Jenkins	358, 359
v. Hanford	349, 377	Barbank v. Crooker	122
Browns v. Holmes, 98, 257, 289,		Burch v. Watts	758, 761
292, 425, 460		Burdett v. Hunt	292
Brown's Admx. v. Manning	110	Burdick v. McVanner	12, 91
Brubaker v. Ponge	554	Burgert v. Borchert	420
Bruce v. Learned	503	Burk v. Birchard	613
v. Ulery	341	Burke v. Koch	646
v. Westervelt	17, 72, 106	Burkeholder v. Rudrow, 316, 519	
Brueghurst v. Pollard	285	Burket v. Boude	26, 27
Bruen v. Ogden	15, 33, 163	v. Pheister	603
Brundage v. Camp	138, 218	Burkle v. Luce, 379, 381, 426,	
Bruner v. Dyball, 132, 242, 248,		721, 725, 747, 766	
373, 377, 380, 701		Burnell v. Hunt	111
Brunschweig v. Schaper	775	Burnett v. Lockwood	500
Brush v. Fowler	345	Burnley v. Lambert	423

	PAGES.
Burns v. Cooper.....	21
v. Lidwell.....	433
Burr v. Dougherty, 14, 15, 49, 247	
Burrage v. Melson, 16, 140, 316,	510
Burrall v. Vanderbilt.....	757
Burrill v. Hopkins.....	471
Burrows v. Waddell.....	261, 439
Burt v. Burt.....	40, 423, 481, 537
v. Dutcher.....	522
Burton v. Curyea.....	105, 138, 218
v. Fulton.....	341
v. Hough.....	104
v. Miller.....	750
v. Wilkinson.....	106, 341
Busby v. Noland.....	174
Busch v. Fisher.....	789
Bush v. Lyon.....	56, 75
v. Rawlins.....	374
Busick v. Bunn.....	305, 306
Buside v. Fischer.....	437
Bussey v. Page.....	184
Bussing v. Rice, 132, 247, 267, 701	
Buster v. Newkirk.....	45
Butcher v. Green.....	453
v. Porter.....	393, 645, 722
Butler v. Collens.....	132, 478
v. Mehrling, 457, 473, 477,	478, 507, 542
v. Miller.....	87
Butterfield v. Hensley.....	360
Butters v. Haughwout, 132, 138,	
139, 218, 244, 246, 253	
Button v. Chapin.....	520
v. Hoffman.....	48
Butts v. Collins.....	82
v. Screws.....	385
Byer v. Fenstermacher.....	390
Byrd v. Hall.....	131
v. O'Houlin.....	54
Byron v. Chapin.....	531
v. Crippen.....	31, 42

C.

	PAGES.
Cable v. Dakin.....	473, 503
Cady v. Eggleston.....	357, 738
Caffrey v. Dudgeon, 719, 742, 790,	792
Cagill v. Wooldridge.....	158
Cahill's Appeal.....	739
Cahn v. Reid.....	137
Cain v. Williams.....	764
Caldwell v. Arnold.....	163, 337
v. Bartlett.....	132, 218
v. Bruggerman, 530, 560	565, 607
v. Castard.....	196, 579
v. Cleadon.....	388
v. Cowan.....	106
v. Fenwick.....	49, 440, 464
v. Gans, 380, 763, 770,	779, 809
v. Pray.....	262
v. West, 287, 353, 467,	515, 745, 777
Callomer v. Page.....	686
Calvin v. Bacon.....	102
Camp v. Root.....	692
Campan v. Konon.....	179
Campbell v. Consalus.....	666
v. Head.....	285, 293
v. Jones.....	608, 635
v. Quackenbush.....	262
v. Williams, 16, 52, 57,	155, 428, 581
Campbell Mfg. Co. v. Walker...	123
Campbell Printing Co. v.	
Walker.....	666
Canifax v. Chapman.....	339
Cannon v. Braun.....	668
v. Folsom.....	522
v. Kinney.....	54
v. Sipples.....	338
v. White.....	571
Cantril v. Babcock.....	536
Capital Lumber Co. v. Hall....	429
Cardinal v. Smith.....	168, 175

PAGES.	PAGES.
Carew v. Matthews, 160, 163, 164, 267, 426	Carty v. Hudsons 447
Carey v. Bright 503	Caruthers v. Humphrey 273
Carkin v. Babbett 149	Carver v. Carver 792
Carl v. McGonigal 251	Cary v. Hewitt 16, 96, 373, 442 v. Hotailing 131, 232
Carlisle v. Burley 224	Case v. Campbell 87
v. Weston 12	v. Pettee 354, 742
Carlton v. Dixon 765, 786	v. Rebeline 752
Carlson v. Small 284, 297, 445	v. Woleben 381
Carlton v. Davis 291	Cash v. Quinchett 364, 368
v. Dixon 280	Casper v. Kent Circuit Judge, 232, 692, 754
Carney v. Doyle 285, 401, 551	Cass v. Gunnison 620
v. Gleissner 77, 420	v. N. Y. & N. H. R. R., 226, 243
Carnick v. Wilson 709	Cassell v. Western Stage Co., 16, 68, 574
Carothers v. Van Hagan, 618, 630	Cassidy v. Elias 438
Carpenter v. Hale 226	v. Fleck 303, 322
v. Jones 587	Castle v. Thomas 322
v. Lewis 193	Caswell v. Districh 21
v. Starr 229	C. & S. W. R. R. v. N. W. Packet Co. 288
v. Stevens 440, 464, 646, 753, 766, 799	Cate v. Cate 176
Carr v. Barnett 434	Cather v. Bray 617
v. Ellis 662, 797, 808	Catlin v. Warren 134
v. Phillips 160, 163	Catterlin v. Mitchell 163, 281, 315
Carrel v. Early 440, 464, 465	Cayward v. Doolittle 324
Carrico v. Taylor 676	C., B. & Q. R. R. Co. v. Painter, 126 441
Carrier v. Carrier 600, 629	Center v. Gebney 282
v. Gale 554	Central R. R. Co. v. Fritz 192
Carroll v. Harris 392, 393	Chadbourn v. Rahilly 699
v. Hussey 147, 150	Chadwick v. Badger 354, 367
v. Pathkiller 11, 475	v. Broodwell 433, 540
v. Woodlock 663, 777	v. Miller 4, 6, 7, 639
Carson v. Applegarth, 604, 620, 632	Chaffee v. Harrington, 55, 70, 112 v. Langston 355, 790, 791
v. Golden 497, 535	Chamberlain v. Brown 705
Cartelyou v. Lansing 522	v. Winn 584
Carter v. Carter 478	Chambers v. Hunt, 112, 114, 115, 117, 227, 406, 407
v. Commander 706	v. Waters 754, 759
v. Duggan 363	Champion v. Vincent 527
v. Farley 127	Chandler v. Allison 507, 509
v. James 664	v. Edson 206
v. Piper 393	
v. Streater 441, 484	
Carty v. Blevins 49	
v. Fenstemaker 96	

	PAGES.		PAGES.
Chandler v. Lincoln, 111, 391, 409, 411, 550, 652		Claggett v. Richards, 356, 365, 739	
v. Smith.....236, 337, 708		Clap v. Guild.....326, 558, 805	
Chapman v. Andrews.....12, 42		Clapham v. Crabtree.....804	
v. Kerby.....543		Clapp v. Shepard.....48, 226	
v. Kerr.....419		v. Trowbridge.....642	
Charlotte, &c., v. Stouffer, 188, 191		v. Walter, 457, 475, 478	
Chas. Baumbach Co. v. Miller... 143		Clark v. Adair.....355, 462, 639	
Chase v. Allen.....399		v. Bales.....631	
v. Ewing.....554		v. Bell.....367, 741	
Chatterton v. Saul.....186, 297		v. Benefiel.....295	
Chauvin v. Valiton.....478		v. Bush.....785	
Chenyworth v. Daily.....257		v. Clinton.....740	
Cheyary v. Jenkins.....168		v. Connecticut.....369	
Chicago Dock Co. v. Foster.... 218		v. C. R. R. R.....354	
Chicago T. P. R. R. v. Lowell, 105		v. Dunlap.....350	
Chicago, &c., v. Northwestern, 559, 401		v. Griffith.....44, 119	
Chickering v. Raymond.....48		v. Heck.....602, 611	
Childs v. Childs, 18, 104, 396, 541, 600, 613		v. Howell.....199, 795	
v. Hart.....288, 312, 313		v. Keith.....452, 602	
Chiles v. Drake.....506		v. Lamoreaux.....434	
Chilson v. Jenneson.....627		v. Lewis, 173, 244, 246, 247, 248, 251, 252, 255, 270	
Chinn v. McCoy.....719, 789, 796		v. Martin.....458, 477, 479	
v. Russell, 12, 73, 150, 252, 286, 429		v. Norton.....83, 338, 355, 716, 725, 754, 759, 762, 775	
Chipstead v. Porter.....339		v. Pinney.....482, 513	
Chissom v. Hawkins.....19, 21, 49		v. Reyburn.....184	
v. Lamcool.....575, 780		v. Shee.....292	
Choate v. Quinichett.....768		v. Skinner, 14, 55, 150, 154, 165, 224	
Choen v. Porter.....408		v. Stipp.....178	
Christol v. Craig.....316		v. Warner.....632, 641	
Christy v. Scott.....91		v. West, 15, 52, 86, 416, 696, 698	
Church v. De Wolf.....630		Clary v. Roland, 632, 716, 731, 759, 761	
v. Drummond.....360		Clay v. Coperton.....404, 428	
v. Frost.....229		Clayton v. Ganey.....300, 431	
Churchill v. Lee.....149		v. Johnson.....144	
City Council v. Price, 747, 790, 791		Cleaves v. Herbert.....69, 89, 285	
City of Bath v. Miller.....674		Clement v. Duffy.....773	
Clafin v. Carpenter.....186		Clements v. Glass.....475	
v. Davidson.....608, 658		v. Wright.....578, 579	
v. Fletcher.....667			
v. Thayer.....352, 360, 367			

PAGES.	PAGES.
Clerk's Office v. Hufstetter..... 758	Collins v. Hough6, 453, 762
Cleveland v. Shoeman..... 234	v. Makepeace..... 597
Clift v. Shocby..... 553	v. Wellington..... 164
Climer v. Russell.....154, 165	Collman v. Collins..... 80
Cline v. Gant..... 666	Collomb v. Taylor..... 11
v. Libby..... 88	Colo. Nat. Bank v. Lester..... 356
Clinton v. King..... 334	Colorado Springs Co. v. Hop-
Clowes v. Hawley..... 47	kins.....730, 791
Coats v. Farington..... 157	Colt v. Eves.....331, 337
Coates v. Hopkins..... 574	Colton v. Mott..... 112
Cobb v. Downs..... 218	Colwell v. Brower..... 74
v. Megrath..... 54	Colwill v. Reeves..... 213
Cobbey v. Wright..... 164	Coman v. Thompson..... 557
Coburn v. Harvey..... 27	Com. Bank v. Kortwright..... 522
Cochran v. Golwold.....457, 654	Commissioner's Rush Co. v.
v. Winburn..... 485	Stubbs..... 186
Coddington v. Bay..... 139	Commonwealth v. Dorsey..... 805
Cody v. Eggleston..... 352	v. Kelley..... 747
Coe v. Gregory..... 175	v. Kennard.... 345
v. Peacock.....534, 541	v. Marrow..... 618
Coffin v. Gephart.....37, 39	v. Moses..... 224
v. Knott..... 435	v. Rees, 334, 335
v. McLean..... 803	Congregational Soc. v. Flem-
Cogan v. Stoutenburgh..... 155	ming.....190, 198
Coghill v. Boring, 122, 126, 129,	Conihan v. Thompson..... 806
131, 135, 650	Conkey v. Hopkins..... 737
Coit v. Waples, 288, 290, 393, 599,	Conklin v. Parsons..... 192
602	Conley v. Derre..... 158
Colborn v. Barton..... 303	Connah v. Hale.....248, 256
Colby v. Yates..... 667	Conner v. Comstock, 138, 240,
Cole v. Mann..... 31	247, 253, 566, 637,
v. St. L. & P. Ry.....249, 424	652
Cole, Admr., v. Conoly, 346, 466,	v. Henderson..... 136
570	Connoly v. Edgerton..... 615
Colegrove v. Dias..... 260	Connor v. Bludworth.....185, 296
Coleman v. Bean.....739, 765	Constantine v. Foster, 550, 565,
v. Reel.....630, 708	645
v. Wade..... 762	Contril v. Babcock..... 757
Coles v. Hulene..... 738	Conyers v. Ennis..... 134
Collamer v. Page, 639, 653, 658,	Cook v. Bassett..... 140
716	v. Bouk..... 740
Collier v. Beckley.....245, 423	v. Farrington..... 137
v. Yearwood.....227, 416	v. Freudenthal.....362, 743
Collins v. Evans, 57, 106, 394, 565,	v. Hamilton.....459, 463
643	v. Hartle..... 523

PAGES.	PAGES.
Cook v. Hopper..... 536	Coverdale v. Alexander, 365, 369, 743
v. Horwitz..... 738	Coverlee v. Warner.....11, 34, 395
v. Howard..... 71	Covill v. Hill..... 218
v. Lathrop.....724, 726	Cowden v. Lockridge..... 500
v. McElvey..... 606	Cowdin v. Pease..... 732
Cool v. Roche.....8, 395	v. Stanton..... 804
Cooley v. Davis, 147, 150, 155, 156	Cowling v. Greenleaf..... 648
Coombs v. Gorden....149, 439, 442	Cox v. Albert..... 310
Coomer v. Gale Mfg. Co..... 230	v. Currier..... 82
Coon v. Bowles..... 388	v. Fog..... 55
v. Congden..... 427	v. Grace.....306, 308, 309, 386
v. Male..... 20	v. Hardin..... 106
Cooper v. Blakeman..... 393	v. Morrow.....10, 52, 60
v. Brown, 78, 360, 639, 714, 716, 759	Crabbs v. Koontz, 541, 783, 801, 807
v. McGrew..... 731	Crabtree v. Chapham, 115, 674, 782
v. Peck..... 657	Craig v. Davis..... 444
v. Thompkins.....160, 163	v. Grant..... 573
v. Watson.....193, 202	v. Kline.....33, 487, 488, 504
Cope v. Romeyne..... 184	Crans v. Cunningham..... 302
Copeland v. Majors.....599, 632	Cranz v. Kroger.....242, 253, 556
Copland v. Basquet..... 125	Crapo v. Seybold..... 119
Coply v. Rose..... 11	Cravath v. Plympton..... 224
Copuro v. Builders' Ins. Co..... 436	Crawford v. Furlong, 258, 314, 461
Corbitt v. Brong..... 13	v. Hagood..... 780
v. Heisey.....18, 79, 419	v. Wright..... 37
v. Lewis.....116, 223	Creamer v. Ford, 13, 358, 758, 793
Corcoran v. White..... 227	Creighton v. Newton, 399, 437, 527
Cordwill v. Gilmore..... 575	Crenshaw v. Moore..... 54
Cornell v. Cook..... 349	Cresson v. Stout, 178, 182, 187, 190
v. Lamb..... 26	Crews v. Pendleton..... 182
Corn Exch. Bank v. Blye, 158, 483, 624, 625, 626, 710, 723	Criddle v. Criddle..... 554
Cornish v. Kusee..... 732	Crippen v. Morrison..... 586
Cory v. Silcox.....527, 618	Crist v. Francis..... 687
Coryton v. Lithebye..... 112	v. Parks.....282, 302
Cotter v. Doty.....155, 444	Crites v. Littleton..... 705
Cotton v. Watkins.....93, 95	Crittenden v. Lingle.....149, 371
Council v. Averett.....632, 755	v. Steele.....305
Courtis v. Cane, 215, 220, 245, 250	Crocker v. Hoffman.....599, 603
v. Case..... 248	v. Mann, 27, 31, 33, 68, 71
Courtland v. Morrison..... 226	

	PAGES.		PAGES.
Crockett v. Crain.....	110	Daggett v. Robbins, 154, 700,	701
Croft v. Franks.....	164	Dahler v. Steele.....	693
Cromeline v. Brink.....	182	Dalby v. Campbell.....	785
Cromwell v. Owings.....	148	Dalglish v. Grady.....	27
Cropper v. Coburn.....	111	Dame v. Baldwin.....	220
Cropsy v. Perry.....	177	v. Dame.....30, 32, 69,	191
Crosby v. Baker.....	345	v. Fales.....	338
v. Jeroloman.....	662	Damm v. O'Connell.....	533
v. Leng.....	216	Damon v. Bryant.....	404
Cross v. Hulett.....	115	D. & M. R. Co. v. Steinburg ...	574
Crosse v. Bilson.....	388, 451	Damron v. Roach.....	316, 510
Crouse v. Derbyshire.....	21	Dana v. Bryant.....	601
Crow v. Vance.....	91	v. Fiedler.....	526
Crowfoot v. Gurney.....	92	Daniel v. Daniel.....	42
Crum v. Elliston.....	39, 385, 303	Daniels v. Brown.....	19
v. Hill.....	187	v. Cole.....	314
Cruts v. Wray.....	541	v. Nelson.....	168
Cullum v. Bevans.....	33, 114, 565	v. Paterson.....	354
Cumberland v. Tilghman.....	512	Danniels v. Fitch.....	221, 776
Cummings v. Gann, 80, 254, 255,		Darby v. Cassaway.....	478
353, 394, 506, 507,		Darling v. Conkling.....	287
577		v. Tegler, 240, 257, 268,	
v. McGill.....	35, 558	541	
v. Stewart.....	226, 625	Darrett v. Donnelly.....	553
v. Tindall.....	224	Dart v. Horn.....	308, 618
v. Vorce, 6, 244, 247,		Darter v. Brown.....	446
257, 306		Dascey v. Harris.....	144
Cunard v. Franklin.....	407	Dashler v. Dodge.....	410
Cunningham v. Baker.....	21, 251	Daugherty v. Cooper.....	88, 654
Curd v. Wunder.....	67	Daumiel v. Gorham.....	252
Curdy v. Brown.....	52	Davenport v. Burke.....	690, 709
Cure v. Wilson.....	282	v. Ledger.....	503, 543.
Curriac v. Packard.....	747	David v. Bradley.....	533, 728
Currier v. Ford.....	56, 60, 70	v. David.....	290
Curtis v. Cutler.....	297	Davidson v. Gunsally.....	290, 540
v. Groat, 193, 204, 206,		v. Waldron, 52, 53, 163	
493		Davies v. Richardson Exrs.....	512
v. Jones.....	79, 390, 412	Davis v. Bayless.....	333
v. Ward.....	488	v. Brown.....	665
Cushenden v. Harman.....	731, 788	v. Calvert.....	396
Cushing v. Longfellow, 486, 512,		v. Crow, 499, 501, 788, 796,	
524, 525		808	
Cusick v. Cohen.....	366	v. Easley, 198, 203, 204,	
Cusson v. Stout.....	71	290, 579	
Cutler v. Rathbone, 279, 282, 303			
Cutting v. Grand Trunk Ry....	271		

	PAGES.		PAGES.
Davis v. Fenner.....	480, 667	Decker v. Judson, 739, 765, 792,	793
v. Fish.....	618	v. Livingston.....	112, 389
v. Gambert.....	703	Deeter v. Sellers.....	248
v. Harding, 643, 724, 725,	800	DeForest v. Lute.....	316
v. Loftin.....	71, 73	Degering v. Flick.....	610, 638
v. Lottich.....	392	Dehler v. Held.....	778
v. Oswald.....	509	Dehr v. Lampton.....	692
v. Randolph.....	37, 39	Delahay v. Clement.....	729
v. Scott.....	73, 145	Delancy v. Holcomb.....	244, 248
v. Soltish.....	115	Delaney v. Canning.....	417
v. Stewart.....	133	Delaware R. R. Co. v. Pretty-	
v. Taylor.....	186	man.....	172
v. Tyler.....	391	Delin v. Stohl.....	130
v. Warfield.....	309, 400	Demers v. Clemens.....	809
v. Wilbourne.....	666	Demick v. Chapman.....	71
Davison v. Gill.....	337	Demott v. Hagerman.....	195, 196
Dawling v. Palack.....	693	Deniston v. Draper.....	374
Daws v. Green.....	53	Denney v. Reynolds, 791, 797, 808	
v. Morse.....	109	Dennis v. Snell.....	445
v. Rush.....	458	v. Crittenden.....	301
Dawson v. Wetherbee, 565, 643,	650, 682	Denton v. Smith.....	263, 560
Day v. Compton.....	156	Denver v. Frame.....	103
v. Vallette.....	662	Depew v. Leal.....	286, 302
Dayton v. Fry, 83, 392, 403, 404,	411	Derby v. Gallup.....	468, 471
Deacon v. Powers.....	113, 223, 286	DeRequine v. Lewis.....	359
Deaderick v. Oulds.....	82	Dermott v. Wallach.....	407
Deaker v. Matthews.....	312	Derter v. Sellers.....	75, 261
Deal v. Osborn.....	457, 466	Desha v. Pope.....	54
Dean v. Ball.....	737	Deshler v. Dodge.....	166
v. Oppenheimer.....	299	Deshon v. Bigelow.....	122, 218
Deane v. Lockwood.....	127	DeThomas v. Witherby.....	440
Dear v. Osborn & Co.....	585	Detroit Daily Post v. McAr-	
Dearborn v. Kelly.....	357	thur.....	506, 507
Deardorf v. Ulmer, 287, 360, 363,	365, 790	Devendorf v. Wert.....	527
Dearing v. Ford.....	240, 248	Devereux v. Burgmin.....	471
Dearman v. Blackburn, 30, 148,	166, 697	Devlin v. Coleman.....	313
DeBow v. Applegate.....	360, 361	Devries v. Phillips.....	554
Deck v. Smith.....	467	Dewey v. Bawman.....	91
Decker v. Anderson.....	765, 766	Dewint v. Wiltsie.....	510, 543
		DeWitt v. Morris.....	325, 337, 464
		DeWolf v. Harris, 112, 113, 114,	117, 226, 227, 386, 556
		Deyo v. Jennison.....	150
		Deyoe v. Jameson.....	234, 660, 698

	PAGES.		PAGES.
Dezell v. Odell.....	33, 59, 61, 83	Donaldson v. Farwell.....	131, 134
Dias v. Freeman.....	717	v. Johnson, 599, 612,	621
Dibble v. Morris.....	499	Donohoe v. McAleer.....	381, 462
Dick v. Smith.....	475	Doogan v. Tyson.....	358, 717
Dickinson v. Boyle.....	510	Dooley v. Crist.....	186, 189
v. Hendryx.....	796	Doom v. Lockwood.....	272
v. Lovell.....	653	Dorr v. Dudderar.....	185
v. Noland, 308, 432,	640	Dorrington v. Meyer.....	654, 756
Dickson v. Mathers.....	54, 57, 394	Dorsey v. Gassaway, 453, 473,	475, 503
v. Randal, 76, 252, 385,	587, 708	v. Manlove.....	503, 510
Dietzsch v. Huidekoper.....	723	Dorus v. Somers.....	368
Dillenback v. Jerome, 36, 224,	523	Doty v. Gorham.....	186
Dillingham v. Smith, 213, 400,	608	Douch v. Rohner.....	152
Dillon v. Wright...33, 42, 388,	404	Dougherty v. Bonavia.....	90
Dilworth v. McKelvy, 91, 433, 536	538, 539, 631, 654	v. Cooper.....	534
Dimond v. Downing.....	577	v. Haggin.....	605
Ditson v. Randall.....	218	Doughty v. Brown.....	663
Divssy v. Morgan.....	370	Douglas v. Gardner, 288, 322, 352,	366
Dix v. Van Wyck.....	17, 412	v. Kraft.....	509, 514, 522
Dixon v. Hancock.....	42	v. Newman.....	236
v. Niccolls.....	19, 21	v. Wolf.....	44, 72
v. Thatcher, 51, 106, 366,	400, 447	Douglass v. Douglass.....	676, 724
D. L. & W. R. R. Co. v. Toffey, 601		v. Garrett, 393, 455, 527	
Doak v. Exrs. of Snapp.....	526	Douty v. Bird.....	507
Doane v. Lockwood.....	128	Dover v. Rawlings.....	392
Dodd v. McCraw.....	151	Dow v. Rattle.....	630
v. Thomas.....	429, 660	v. Sanborn.....	131
Dodge v. Brown.....	213	v. Sudbury.....	175
v. Chandler.....	533	Dowell v. Richardson, 165, 285,	352, 529, 608, 619
v. Runnels.....	471	v. Taylor.....	339
Dodworth v. Jones.....	57	Downard v. Groff.....	182
Doe v. Cunningham.....	363, 737	Downs v. Beck.....	513
v. Martyr.....	219	Dows v. Bignall.....	45, 292
Doering v. Kenamore.....	227	v. Rush.....	632
Dogan v. Bloodworth.....	159	Doxon v. Duke.....	410, 435
Doggett v. Robbins, 14, 33, 165,	682	v. Hancock.....	52
Dolan v. Van Demark.....	539, 541	Doyle v. Dobson.....	553
Dolby v. Campbell.....	775	Dozier v. Joyce.....	54, 424, 645
Domestic S. M. Co. v. Arthur-		Drake v. Auerbach.....	44, 48, 485
hultz.....	92	v. Wakefield.....	576

	PAGES.
Drane v. Hilzheim.....	606, 607
Draper v. Ellis.....	248, 289, 301
Draycott v. Piot	292
Dresher v. Carson.....	658
Driscoll v. Place	337
Drummond v. Hopper, 12, 102,	105, 152
Dubois v. Glaub.....	507, 526
v. Harcourt.....	55
v. Hutchinson	431
v. Webster.....	172
Duboise v. Kelly	197
Dudley v. Hawley.....	216
v. Ross, 40, 168, 171, 173,	311
Dufer v. Hayden.....	123
Dufresne v. Hutchinson.....	102
Dugan v. Nichols.....	256
Duggon v. England.....	731
Duke v. Shackelford	124
Dulin v. Howard	684
Dunbar v. Bittle.....	599
v. Rowls	127
v. Scott	361
Duncan v. Brennan.....	57, 75
v. Green	42
v. Spear.....	71, 645
Dunham v. Wyckoff....	71, 73, 166,
	297
Dunkin v. McKee.....	61, 83
Dunn v. Crocker	309
Dunning v. James.....	168
v. South.....	104
Dunott v. Hagerman.....	112
Durfee v. Jones	82
Durham v. Shannon	553
Durning v. Waddingham.....	806
Durrell v. Haley	139
Durst v. Burton	478, 523, 526
Dwight v. Brewster.....	249
v. Enos.....	462, 632, 641
Dyer v. Clark.....	112
v. Grand Trunk.....	271
Dynes v. Hoover.....	337, 338
Dyson v. Ream.....	436

E.

	PAGES.
E. & C. R. R. Co. v. Marsh.....	270
Eads v. Stephens.....	281, 378
Eagle v. Rohrheimer.....	555
Eakin v. Eakin.....	112, 549
Eames v. Snell.....	100
Earl v. Camp.....	152, 341
v. Tupper.....	499
Earle v. Burch.....	72, 235, 614
East Boston Co. v. Person	303
East India Co. v. Hensley.....	102
Eastern v. Fleming.....	59
Eastman v. Barnes.....	356, 684
v. Premo.....	572
Easton v. Worthington, 598, 632,	645
Eaton v. Caldwell.....	461, 598
v. Monroe.....	122, 231
v. Southby.....	14, 44
Eberstein v. Camp.....	75
Ecker v. Moore.....	576
Edeline v. Thompson, 394, 406,	619
Edge v. Parker.....	157
Edgell v. Tucker.....	92
Edgerly v. Emerson.....	290
Eddy v. Beal, 282, 293, 302, 309,	384
v. Davis.....	44
v. Hall.....	186
Edmonds v. Groves.....	406
Edmunds v. Hill	82, 265
v. Leavitt.....	577
Edwards v. Cottrell.....	235, 762
v. McCurdy, 407, 666,	754
v. Talcott.....	418
Eggleston v. Mundy, 34, 96, 582	
Eiesdrath v. Knauer.....	53, 56
Eiseley v. Malchow.....	595
Ela v. Shepard	341
Ela & Another v. Bankes, 595, 660	
Eldred v. Bennett.....	728, 762
v. The Oconto Co., 210, 211,	240, 246, 290, 601, 603

	PAGES.
Eldred v. Woolaver.....	648
Eldridge v. Adams.....	6, 249
Elgee v. Lovell.....	314
Elkins v. Griesemer.....	156
Ellengbor v. Brackken.....	253, 294
Elliot v. Black, 191, 342, 717, 718, 719	
v. Powell.....	200, 562
v. Whitmore.....	152, 286
Ellis v. Cleveland.....	347
v. Culver.....	15, 114, 620
v. Howard.....	554
v. Lersner.....	37
v. Wire.....	525
Ellsworth v. Henshall.....	294
Elves v. Mawe.....	188
Ely v. Ehle, 30, 32, 69, 256, 297, 300, 392, 393	
Emerick v. Sloan.....	7, 168, 172
Emery v. Cobbey.....	49
Emmerson v. Booth.....	748
Emmett v. Briggs.....	408
Emmons v. Dowe.....	55, 602, 662
Empire S. T. F. Co. v. Grant..	97
Engle v. Jones.....	341
English v. Caldwell.....	575
v. Dalbrow.....	328
Enos v. Bemis.....	168, 311, 434
Entsminger v. Jackson, 18, 286, 295, 665	
Erb v. Perkins.....	157
Erlinger v. The People.....	355
Ernst Bros. v. Hogue.....	697, 757
Eslava v. Dillihunt.....	607, 632
Esson v. Tarbell.....	37, 93, 582
Estey v. Harmon.....	758
Esty v. Love.....	233
Etter v. Edwards.....	255
Evans v. Bouton.....	282
v. Brander, 23, 334, 353, 682, 785	
v. King.....	380, 747, 763
v. Parker.....	349
Evelette v. Blossom.....	31, 271
Everett v. Buchanan.....	65, 300

	PAGES.
Everett v. Coffin.....	79, 250
v. Saltus.....	315
Everit v. Walworth, 603, 604, 636	
Ewing v. Blount.....	181, 458, 525
v. Van Arsdale.....	388, 391
<i>Ex parte</i> Wright.....	692

F.

Faddis v. Woollomes.....	76
Fagen v. Davison.....	510
Faget v. Brayton, 300, 302, 316, 451, 573, 615	
Fahnestock v. Gilham, 186, 191, 356, 357, 806	
Fairbanks v. Malloy.....	129
v. Phelps.....	52, 68
v. Witter.....	499
Fairchild v. Lynch.....	666
Fairfield v. Nye.....	95
Fairman v. Fluck, 390, 420, 422	
Falkner v. Baden.....	792
Fallon v. Manning, 453, 481, 537, 538, 539, 800	
Fant v. Wilson.....	792
Farington v. Payne.....	248
Farland v. Farmer.....	107
Farley v. Lincoln, 124, 138, 139, 142, 144, 218, 257	
Farmer v. Calvert.....	400
Farmers &c. v. St. Clair.....	613
Farmers L. & T. Co. v. Com. Bank.....	463, 604
Farnham v. Chapman.....	370, 666
v. How.....	282
v. Moore, 536, 537, 780	
Farrant v. Thompson.....	105
Farrar v. Chauffetete.....	250
v. United States.....	785
Farrow v. Orear.....	750
Farwell v. Fox.....	290, 291, 324
v. Hanchett, 128, 132, 267	
v. Rogers.....	100
Faulkner v. Brown.....	540
v. Harding.....	204

PAGES.	PAGES.
Faulkner v. Klamp..... 219	Fishli v. Fishli..... 662
v. Meyers..... 602	Fisk v. Wallace..... 710
Faweett v. Osborn..... 217	Fisler v. Beall..... 425
Fawkner v. Baden..... 689, 735	Fisse v. Katzentine 715, 729
Fay v. Duggan 111, 227	Fitch v. Dunn..... 83
Fayette Ins. Co. v. Rogers..... 223	v. Newberry..... 80
Feagin v. Pearson..... 45	Fitzer v. McCannon..... 604
Fedder v. Abrahams..... 37	Fitzhugh v. Wiman..... 457, 632, 641
Federhen v. Smith 372	Flack v. Warner 124
Felton v. Hales 105, 269	Flagg v. Tyler..... 718
Fenn v. Harrington 743	Flanders v. Locke..... 200, 575
v. Harrison 102	v. Chamberlain..... 273
Fenner v. Kirkman..... 258	Flannigan v. Goggins..... 48
Fenney v. Fechtner..... 151	F. L. & T. Co. v. Cone 455
Fensier v. Lammon 160, 627	Flatner v. Good..... 234, 582
Ferguson v. Barber..... 785	Fleet v. Lockwood, 356, 369, 639,
v. Hogan..... 478	682
v. Moore 348, 361	Fleming v. Hawley..... 480
v. Rafferty 485, 582	v. Wells..... 699
v. Rutherford..... 574	Fletcher v. Lee..... 334
v. Thomas..... 91	v. Wilkins..... 14
v. Washer..... 151	Fleutge v. Priest..... 46, 433
Fernald v. Chase..... 38, 247	Florence S. M. Co. v. Warford. 215
v. Linscott..... 184	Florence Soap Co. v. Jacobus. 138
Ferrell v. Humphrey, 399, 437, 446	Florraine v. Goodin..... 356
Fettyplace v. Dutch..... 62	Flynn v. Jordan..... 556
Fich v. Hollinger..... 511	Folmar v. Copeland..... 36
Fidler v. Delavan..... 297	Fonda v. Van Horne. 10, 151, 256
Field v. Post..... 456	Fontleroy v. Aylmer..... 284
Finch v. Blount..... 523	Fora v. Dyer 441
v. Hollenger 262	Forbes v. Shattuck, 119, 209, 210,
Finehout v. Crain 313, 326	214, 689
Fink v. Flanagan..... 302	Forbes <i>ex rel.</i> v. The Judge, &c. 329
Fiquet v. Allison..... 21	Ford v. Bushor..... 377
Firestone v. Meshler..... 232	v. Ford..... 77, 178
First Natl. Bank v. Crowley, 141,	Fordyce v. Pipher..... 405
536, 537	Foredice v. Rinehart..... 291, 608
v. Dunn..... 375	Forkner v. Shafer..... 143
Fisher v. Busch 432, 698	Forsyth v. Wells, 47, 205, 486,
v. Gordon..... 429	500
v. Marquett..... 430, 700	Fort v. Saunders..... 524
v. Peirson..... 447	Forth v. Pursley..... 68, 106
v. Prince..... 523	Forty v. Imber..... 388
v. Whoollery, 14, 370, 457,	Foshay v. Ferguson, 217, 247, 267
458, 462, 670	v. Riche 447

PAGES.	PAGES.
Gale v. Rector..... 796	Gedday v. Witherspoon..... 428
Gallagher v. Bishop, 38, 40, 231, 638, 675	Geisendorf v. Eagles..... 530
v. Goldfrank..... 154	Gelbreath v. Jones..... 230
Gallarati v. Orser..... 716, 754, 759	Gelston v. Hoyt..... 156
Galloway v. Bird..... 3, 41	Gent v. Cutts..... 720
Galusha v. Butterfield..... 393	Gentry v. Barnett..... 440
Galvin v. Bacon, 102, 217, 246, 247, 269	v. Borgis..... 298, 404
v. Smith..... 251	Gerard v. Dill..... 798
Gandy v. Pool..... 435, 708	German American Bank v. White..... 399
Gardiner v. McDermott..... 718, 720	German Ins. Co. v. Grim..... 801
Gardner v. Boothe..... 248	Gest v. Cole..... 42
v. Bugby..... 663	Gibbins v. Peeler..... 221
v. Campbell, 147, 150, 154, 165, 166	Gibbons v. Dillingham, 193, 199
v. Deitch..... 46, 118, 119	Gibbs v. Bartlett, 355, 464, 717, 718, 720, 722, 732, 777, 778
v. Heartt..... 184	v. Chase..... 150, 256, 467
v. Humphrey..... 29, 389	v. Childs..... 100
v. Lane, 295, 325, 426, 577	v. Cruikshank..... 473
v. Matteson..... 90	v. Jones..... 220, 248
v. Scovill..... 289	v. Usher..... 47
Garland v. Bartels..... 604, 657	Gibney v. Marchay..... 554
Garlick v. Bower..... 605	Gibson v. Jenny..... 150, 153
Garlin v. Strickland, 352, 360, 366	v. Mozier..... 396, 562
Garrett v. Carlton, 73, 74, 145, 301	v. Stevens..... 62, 110
v. Wood, 465, 471, 473, 506, 512, 535	Gidday v. Witherspoon..... 642
Garritt v. Vaughan..... 434	Giddey v. Altman..... 576
Garth v. Caldwell..... 44, 182, 615	Gilbert v. McCorkle..... 127
v. Howard..... 423	Gilchrist v. Moore, 240, 247, 253, 587
Gartside v. Nixon..... 52, 57, 66	Gildas v. Crosby..... 41, 49
Garvin v. Paul..... 111, 112	Gillerson v. Mansur..... 64, 198
Gass v. Van Wagner..... 578	Gillespie v. Burleson..... 553
Gates v. Bennett..... 72, 431	v. Brown..... 16
v. Gates..... 57	Gillett v. Treganza..... 60
Gavigan v. Scott..... 578	v. Roberts..... 240, 243, 253
Gay v. Morgan..... 657	Gillham v. Kerone..... 17, 539
v. Stancell..... 697	Gilligan v. Stevens..... 517, 567
Gaynor v. Blewitt, 65, 300, 613, 689	Gillilan v. Kendall..... 99
Gear v. Bullendick..... 197	Gillis v. Wofford, 506, 512, 559
	Gilman v. Hill..... 212
	Gilmore v. Newton, 252, 248, 249, 251, 252, 255, 265

	PAGES.		PAGES.
Gilmore v. Wilbur.....	113	Goodrich v. Fritz, 147, 150, 404	
Gilson v. Wood.....	512	v. Hanson.....	577
Gimble v. Ackley, 33, 150, 252,		v. Jones.....	191
	381	Goodwin v. Bunzl.....	740, 764
Ginaca v. Atwood.....	776	Gordon v. Bucknell.....	691
Ginnis v. Hart.....	805	v. Clapp.....	553
Gipson v. Bump.....	391	v. Farrington.....	157
Gist v. Loring.....	304	v. Harper, 68, 106, 216,	
Gittings v. Carter.....	128		290
Glann v. Younglove, 453, 604, 800		v. Jenny, 32, 212, 381,	
Glass v. Black.....	150		382, 459, 496, 497,
v. Pinckard.....	640		498, 531, 765
v. Pullen.....	769	v. Williamson.....	777
Glasscock v. Hayes.....	473	Gore v. Jenness.....	184
v. Nave.....	404	Gorton v. Falkner.....	342
Glassford v. Hackett.....	355	Gotloff v. Henry, 406, 565, 603,	
Glazier v. Clift.....	399		652
Gleason v. White.....	112	Gottschalk v. Klinger.....	419, 627
Glenn v. Brush.....	349, 411	Gould v. Barnard.....	640
Globe Works v. Wright.....	702	v. Barnes.....	733
Glover v. Chase.....	6	v. Cayuga Co. Nat. Bank	128
v. Hunnewell.....	112	v. Scannell, 413, 447, 453,	
Gluck v. Cox.....	59		455
Goble v. Dillon.....	666	v. Warner, 717, 724, 728,	
Godfrey v. Brown.....	231		730, 745, 772, 785, 807
v. Bullin.....	388	Goulet v. Asseler.....	482
Goff v. Harding.....	39	Governor v. Munroe.....	362
v. Kilts.....	45	Grace v. Mitchell, 10, 11, 40, 230,	
v. O'Conner.....	184, 186		231, 337, 678
v. Shannon.....	44	Graff v. Shannon.....	48
Going v. Orus.....	31, 76	Graham v. Myers.....	68, 230
Goldschmidt v. Berry.....	132	v. Newman.....	36
Goldsmith v. Bryant.....	259	v. Nowlin.....	588
v. Wilson, 560, 573, 607		v. Rogers.....	92
Goll v. Hinton.....	110	v. Shaw.....	567
Goodell v. Bates.....	743	v. Wells.....	335, 369
v. Ward.....	708	Grand Rapids Co. v. Lyon.....	102
Goodheart v. Bowen, 148, 376,		Grange Warehouse v. Owen...	123
	674	Grant v. Booth.....	336
Gooding v. Shea.....	531	v. Steiner.....	99
Goodnight v. Goor.....	749	Graves v. Cowan.....	211
Goodman v. Aylin.....	388	v. Shoefelt, 321, 354, 367,	
v. Church.....	536		438, 690, 765
v. Floyd.....	485	v. Sittig, 352, 451, 453,	
v. Kennedy.....	59, 634		470, 509

	PAGES.		PAGES.
Gray v. Allen.....	437	Grist v. Cole.....	147
v. Dean.....	690	Griswold v. Boley.....	248, 251
v. Earl.....	436	Groat v. Gile.....	293
v. Holdship.....	184	Groff v. Belche.....	209
v. Jones.....	558	Gross v. Bogard.....	72
v. Nations.....	16, 462, 556	Grover v. Huckins.....	140
v. Parker, 52, 203, 205, 210, 291, 394, 400, 566, 574		Guard v. Bradley.....	801
v. Rawson.....	27	Guild v. Rogers.....	26
v. St. John.....	131, 133	Guille v. Wong Fook, 292, 412, 608	
v. Thrasher.....	690	Gulath v. Waldstein.....	606, 637
Greaner v. Mullen.....	134, 577	Gullett v. Lamberton.....	197
Greeley v. Currier, 358, 360, 639, 741		v. Otey.....	385, 555, 794
Green v. Burke.....	612, 721, 760	Gunning v. Williamson.....	513
v. Dingley.....	393, 564	Gunson v. Woodfall.....	216
v. Dunn.....	256	Guthrie v. Jones.....	188, 190, 191
v. Haskell.....	742	v. Weaver.....	45, 337
v. Holden.....	166, 332	Guyon v. Rooney.....	627
v. Kindy.....	349, 804	Gwillim v. Holbrook.....	722
v. Lewis.....	624	G. W. R. R. Co. v. McComas....	80
v. Patchen.....	692		
v. Smith.....	441		
v. Thomas.....	570		
v. Umphrey.....	219		
v. Walker.....	736, 738		
Greenfield Bank v. Leavitt, 512, 513			
Greenwade v. Fisher.....	691		
Greer v. Howard.....	745, 767		
v. Powell.....	512		
Gregory v. McDowell.....	526		
v. Morris.....	70		
v. Schoenell.....	137		
Gremer v. Briggs.....	258		
Greve v. Dunham.....	126		
Grier v. Cowan.....	389		
Griffin v. Lancaster.....	231		
v. L. I. R. R.....	398		
Griffith v. Bogardus.....	45, 292		
v. Fowler.....	220		
v. Smith, 78, 147, 150, 166, 343, 392, 695			
Grindrod v. Lauzon.....	168		
Grinnell v. Phillips.....	331		

	PAGES.		PAGES.
Hale v. Wigton.....	288, 705	Hamilton v. Stewart, 188, 191,	342
Hall v. Amos.....	27	Hammer v. Wilsey.....	467
v. Draper.....	269	Hammond v. Eaton.....	368
v. Durham, 126, 182, 184,	294, 298, 386	v. Lynes.....	130
v. Edrington.....	473	v. Mead.....	54
v. Gillmore, 130, 131, 133,	427	v. Morgan, 141, 616,	669
v. Hall.....	177	v. Sollday.....	528, 570
v. Hinline.....	407	Hanauer v. Bartels, 262, 475, 481	
v. Jenness, 403, 533, 610, 632		Hanchett v. Buckley.....	746
v. Monroe.....	364	v. Riverdale.....	806
v. Moriarity.....	551	v. Sorg.....	128
v. Naylor.....	131	Handley v. Hathaway.....	361
v. Robinson.....	226, 245	Handly v. Rankins.....	669
v. Smith, 355, 453, 682, 717,	718, 756	Hanford v. Obrecht, 596, 617, 653,	669
v. Tittabawassee B. Co... 271		Hanna v. Bailly.....	296, 309
v. Tuttle, 106, 147, 151, 166,	337	v. International, &c., 235,	767
v. White, 37, 223, 229, 230	257, 651, 675	v. Steinberger.....	163
Halleck v. Mixer, 195, 198, 224,	306, 311	Hannebutt v. Cunningham.....	159
Hallenbake v. Fish.....	68, 557	Hannum v. Norris.....	326, 365
Hallensbee v. Ritchey.....	769	Hanover v. Coyl.....	507
Hallet v. Byrt, 163, 338, 343, 702		Hanrahan v. O'Reilly.....	190, 191
v. Fowler.....	53, 637	Hansard v. Reed.....	717
v. Mountstephen... 335, 762		Hanselman v. Kegel.....	467, 480
v. Novion.....	523	Harbough v. Albertson.....	792
Halliday v. Lewis.....	51, 52	Hardin v. Joice.....	74, 424
Hallock v. Rumsey.....	172	v. Palmerlee.....	664
Hallowell v. Milne.....	706	Harding v. Coburn.....	245, 292
Halsted v. Cooper.....	394	Hardy v. Clendening.....	150, 256
Hamaker v. Blanchard.....	82	v. Donnellan.....	110
Hambly v. Trott.....	224	v. Keeler.....	373
Hamer v. Hathaway, 522, 524,	525	v. Moore.....	572
Hamilton v. Browning, 251, 452,	619, 651	Hare v. Stegall.....	28
v. Clark, 45, 637, 653		Harker v. Arundell.....	728, 758
v. Duty.....	236	Harkey v. Tellman, 117, 230, 439	
v. Iowa Bank.....	561	Harkis v. Demont.....	539
v. Singer Sewing Ma-		Harlan v. Harlan, 33, 52, 58, 186,	
chine Co.....	259, 266	190, 195, 198, 200, 210	
		Harman v. Fisher.....	183
		Harmon v. Goodrich.....	576, 683
		Harper v. Baker.....	132, 392
		v. Moffet.....	589

PAGES.	PAGES.
Harriman v. Wilkins.....353, 363	Haverstick v. Fergus.....64, 141
Harrington v. Hubbard..... 132	Hawes v. Robinson.....295, 296
Harris v. Austell.....148, 152, 609	v. Smith..... 737
v. Harris, 44, 46, 635, 726	Hawk v. Leppel..... 154
v. Hillman 257	Hawkins v. Eckles..... 388
v. Newman.....203, 206	v. Hoffman..... 257
v. Smith, 51, 75, 122, 218,	v. Taylor.....379, 380
224, 764, 799	v. Johnson 287
Harrison v. Harrison 513	v. Roberts..... 298
v. Hoff, 193, 196, 197,	Hawley v. Warner, 457, 756, 790
697	v. Bates..... 368
v. McIntosh, 42, 52, 114,	Hay v. Hayes..... 337
218, 407, 447	Hayden v. Anderson457, 533
v. Ryan 464	v. Shed 338
v. Utley 738	Haydon v. Haydon..... 110
v. Wardle 717	Hayes v. Campbell..... 269
v. Wilkin...739, 762, 793	v. Miller.....225, 226
Harrod v. Hill 643	Haynes v. Crutchfield295, 606
Hart v. Blake..... 478	v. Knowles..... 111
v. Fitzgerald, 15, 46, 118,	v. Ledyard 574
227, 291, 432	Haysett v. Ellis..... 554
v. Livingston 269	Haythorn v. Rushforth, 34, 68,
v. Morton..... 211	256, 269
v. Ten Eyck..... 213	Hayward v. George..... 96
v. Tobias..... 781	Haywood v. The State..... 45
v. Vinsant.....200, 579	Hazard v. Hall..... 60
Hartford v. Jones.....255, 290	Hazzard v. Burton.....269, 404
Hartgraves v. Duval..... 640	Heagle v. Wheeland, 154, 159,
Hartlepp v. Cole, 165, 286, 360,	165, 172, 173
737, 789, 791	Heald v. Cushman..... 604
Hartman v. Keown..... 77	Heap v. Jones.....88, 433
Harts v. Wendell.....785, 807	Heard v. James, 12, 202, 203, 206,
Hartt v. McNeel..... 549	506, 507, 526
Harwood v. Smith..... 216	Heath v. West..... 54
v. Smethurst, 6, 42, 69,	Heaton v. Findley.....189, 190
394, 406, 564	Hebel v. Scott..... 625
Haskill v. Andros..... 150	Hecht v. Dettman..... 182
Hass v. Prescott.....296, 615	Hecklin v. Ess..... 280
Hatch v. Coddington..... 434	Hedderick v. Pontet.....733, 739
v. Dwight..... 184	Heddy v. Fuller..... 611
v. Fowler, 17, 38, 52, 53,	Hedman v. Anderson.....395, 437
58, 297, 569	Hedrick v. Gobble..... 554
v. Hart..... 499	Heffner v. Reed..... 629
Hathaway v. St. John..... 232	Hefford v. Alger777, 785
Haven v. Emery..... 191	Helen v. Gray.....58, 79

	PAGES.		PAGES.
Heller v. English.....	618	Hickman v. Dill.....	9, 88, 422, 654
Hellings v. Wright....	302, 388, 407	Hicks v. Britt.....	149, 243, 248
Hemenway v. Bassett.....	184	v. Fluit.....	61
Henach v. Chaney....	361, 367, 736	v. McBride.....	757
Henderson v. Desborough,	287, 560	v. Mendenhall.....	369, 741
v. Feltz	70, 230	v. Stull.....	366, 691, 709
v. Lauck.....	209, 210	Higbee v. McMillian	685
Hendricks v. Decker,	178, 297, 512	High v. Johnson	616, 634
Hendrickson v. Waker.....	614	Highnote v. White	291, 665
Henry v. Ferguson.....	660, 803	Hiles v. McFarlane.....	328
v. Fine.....	248	Hilger v. Edwards.....	68, 560
v. Qackenbush.....	790	Hill v. Bloomer	640
Henshaw v. Bryant.....	131	v. Butler.....	296
Hensley v. Brodie.....	193, 199	v. Covell	242
Herbert v. Waters.....	454	v. Durham.....	18
Herdic v. Young, 14, 15, 33, 58,		v. Fellows.....	564, 634
202, 473, 487, 488, 496,		v. Freeman.....	52, 125, 131
503		v. Graham.....	170
Herley v. Hume.....	403	v. Miller.....	17
Heron v. Beckwith.....	602	v. Nelms	370
Herron v. Hughes....	102, 249, 289	v. Robinson	53, 57, 292
Hersey v. Benedict.....	137	v. Seager	115
Hershey v. Fry.....	169	v. Stocking.....	389, 612
Hershiser v. Delone.....	299, 597	v. Wilkinson, 309, 627, 643,	
v. Jordan.....	732	654	
Hershler v. Reynolds.....	759	v. Wright.....	175
Herzberg v. Sachse, 225, 233, 454,		Hillings v. Wright.....	198
596		Hills v. Parker	158
Hess v. Griggs.....	65	v. Passage	
Hewett v. Hatch.....	63	Hillyer v. Brogden	61
Hewitson v. Hunt.....	6	Hilson v. Blain.....	29
Hewitt v. Jenkins.....	295	Hilton v. Osgood.....	148
v. Morris	412	Hinchman v. Batterson.....	112
Hewlett v. Owens.....	117	v. Doak.....	645
Hewson v. Saffen.....	603, 621	Hinckley v. Kreitz.....	765
Hexter v. Schneider.....	264, 429	v. West.....	599
Heyden v. Anderson.....	801	Hines v. Allen.....	166, 699
v. Smith	539	v. Ament.....	191, 192, 193
Heyland v. Badger...12, 53, 87, 91		v. Chambers	264
Heyman v. Covell....160, 163, 432		Hinkson v. Morrison.....	440, 465
Hibbard v. McKindley	741	Hinman v. Borden.....	331, 334
Hibbs v. Dunham.....	163	Hirschorn v. Carnny.....	127
Hickey v. Hinsdale, 11, 15, 18, 39,		Hirshler v. Reynolds.....	758
49		Hiscock v. Greenwood	206
Hicklin v. Nebraska	736	Hisler v. Carr	525

	PAGES.
Hoag v. Breman.....	698
Hobbs v. Hobbs.....	77
v. Meyers.....	563, 566
Hocker v. Stricker.....	336, 370
Hodgeden v. Hubbard.....	11
Hodges v. Lathrop.....	47
Hodgkins v. Dennett.....	437
Hodson v. Warner.....	122, 127, 163
Hoeffner v. Stratton.....	640
Hoeser v. Kraeka.....	606, 607
Hoester v. Teppe.....	519
Hoffman v. Carow, 215, 216, 220,	250
v. Conner.....	345, 674
v. Noble.....	267, 636, 653
v. Steinan.....	656
Hofheimer v. Campbell.....	363
Hogue v. Fanning.....	609, 630
Hohenthal v. Watson, 453, 458,	667
Hoisington v. Armstrong, 314, 445	
v. Brakey.....	233, 663
Hoke v. Applegate.....	293, 665
Holbrook v. Wight, 12, 248, 249,	256, 315, 563
Holcomb v. Davis.....	177, 254
Holderman v. Manier.....	417
Holiday v. Hicks.....	292
v. Lewis.....	60
Holladay v. Bartholomae.....	97
Holland v. Griffith.....	708
Hollensbee v. Ritchey.....	759
Holler v. Colson.....	59, 794
Holliday v. Camsell.....	223
v. M'Kinne.....	624
Hollingsworth v. Dow.....	79
Hollis v. Smith.....	224
Holly v. Flourney.....	497, 525
Holmark v. Molin.....	122
Holmberg v. Dean.....	399, 401
Holmes v. Bell.....	91
v. Godwin.....	308, 494, 519
v. Sawtelle.....	554
Holton v. Binns.....	115, 117
v. Lewis.....	407

	PAGES.
Homan v. Laboo, 240, 241, 243,	529
Home Ins. Co. v. Howard.....	127
Homer v. Fish.....	498, 774
v. Hathaway, 467, 509, 514	
Hood v. Judkins.....	175
v. Spaeth.....	627, 724
Hoodley v. Watson.....	499
Hooker v. Hamill, 415, 458, 496,	632, 652
Hoover v. Hayes.....	31, 197
v. Rhoads.....	282, 299, 462
Hopewell v. Price.....	452, 577
Hopkins v. Barney.....	393, 395, 455
v. Chambers.....	739
v. Drake.....	9, 154, 166
v. Hopkins.....	15, 390, 447
v. Ladd.....	777
v. Thompson.....	226
Hopper v. Miller.....	56, 70, 104
Horner v. Boyden.....	729, 806
Horr v. The People.....	345
Horton v. Horne.....	641
v. Vowell.....	353
Hoskins v. Robins.....	461
Hosmer v. Moseley.....	570
Hotchkiss v. Ashley, 17, 416, 602,	618, 619
v. Hunt.....	122, 293
v. McVickar.....	55
Houf v. Ford.....	302, 606, 632
Houghtailing v. Osborne.....	618
Houghtaling v. Hills.....	315
Houghton v. Newberry.....	37
v. Peck.....	478, 541
v. Ware.....	366, 367
Houselman v. Kegel.....	76, 459
Houston v. Smythe.....	581
Hove v. McHenry.....	40
Hovey v. Coy.....	659, 726
Howard v. Black.....	387, 396
v. Braton.....	644
v. Crandall.....	166
v. Dill.....	27
v. Reed.....	718, 719

	PAGES.		PAGES.
Howe v. Freeman.....	161	Hunt v. Bay State Iron Co.....	191
v. Handley.....	360, 558, 739	v. Bennett, 408, 599, 602,	611
v. Oyer.....	341	v. Bond.....	785
Howell v. Foster.....	304, 406, 684	v. Chambers, 12, 13, 14, 18,	51, 57, 69, 71, 113, 117,
v. Kroose.....	268	411, 564, 565	
v. Skink.....	182	v. Mootry.....	697
Howes v. Newcomb.....	98	v. Moultrie.....	653
Howland v. Fuller.....	153, 562	v. Pratt.....	150
v. Howland.....	76	v. Robinson, 15, 377, 379,	380, 763, 770
v. Woodruff.....	76, 122	v. Rousmanier.....	228
Hoyt v. Thompson.....	226	v. Strew.....	31, 58, 72, 106
Hubbell v. Allen.....	99	v. Williams.....	262
Huber v. Shearick.....	149	Hunter v. Hoole.....	630
Huckell v. McCoy.....	350, 628	v. Hudson, 130, 131, 284,	297
Hudd v. Ravenor.....	24	v. Le Conte.....	447
Huddleston v. Huey.....	36, 55	v. Sherman, 730, 731, 772	
Hudler v. Golden, 32, 168, 169,		Hurd v. Gallaher.....	471, 653
170, 172, 174, 401		v. Simonton, 284, 285, 289,	386
Hudson v. Mase.....	245, 247	v. West.....	11, 292
v. Snepes.....	421	Hurlburt v. Goodsill.....	447
v. Swan, 115, 120, 315,	392	Huron v. Beckwith, 18, 400, 598,	629
v. Young.....	473	Hurst v. Gwennap.....	158, 218
Huebner v. Koebke.....	87	Hurt v. Wilson.....	748
Huebschmann v. McHenry.....	197	Hussey v. Thornton.....	125, 131
Huff v. Gilbert.....	602, 612	Huston v. Wilson.....	602
Huggeford v. Ford.....	461, 467, 558	Hutchins v. Buckner.....	469, 475
Hughes v. Newsone.....	362	v. Hutchins.....	249
v. Wickliffe.....	786	v. Weldin.....	75
Hull v. Halstead.....	658	Hutchinson v. Bobo.....	249
v. Hull.....	70, 212	v. Dubois.....	111
v. Jenness.....	234	v. McClellen, 14, 333,	348
v. Tuttle.....	55	Hutchison v. The Common-	
Human v. Pettitt.....	554	wealth.....	210
Hume v. Tufts.....	54	Hutt v. Bruckman.....	17, 90
Humfrey v. Misdale.....	454	v. Morrell.....	664
Humphrey v. Boyn.....	118, 326, 687	Hutton v. Denlon.....	796
v. Taggart, 354, 355,		Hyatt v. Adams.....	507
716, 717, 719, 720,		v. Wood.....	151
727, 728			
Humphries v. Reed.....	271		
Hundley v. Buckner.....	225		
Hungerford v. Redford, 194, 200,			
205, 486, 488, 496			
Hunn v. Hough.....	379, 380		

	PAGES.
Hyde v. Cookson,	204, 206, 212, 488
v. Noble.....	102, 218, 257
v. Patterson.....	384
v. Stone.....	468, 471

I.

I. & St. L. R. & C. Co. v. Ogle,	487
Ice v. Lockridge.....	297, 314
Isley v. Stubbs,	106, 166, 337,
	695, 701, 702
Imel v. Van Derin.....	716, 781
Inberville v. Self.....	444
Ingalls v. Bulkley,	240, 245, 247,
	255, 256, 270, 391, 395,
	563
v. Lord.....	483
Ingersol v. Emmerson,	55, 68, 71,
	103, 104, 218
Ingersoll v. Van Bokkelin,	485,
	540
Ingle v. Mudd	592, 599
v. Scott	283
Inglebright v. Hammond,	21, 209,
	210
Ingraham v. Hammond,	392, 408,
	645
v. Mead	407
v. Martin.....	57, 87, 643
Inhabitants of Brooklyn v.	
Sherman.....	62
Iron Cliff Co. v. Lahais.....	155
Iron Co. v. Tilghman	457
Irvin v. Smith	678, 679
Irving v. Motly	133
Irwin v. Knox	602
Isaac v. Clark.....	10, 256, 274
Ives v. Carter	499
v. Humphreys.....	125
Ivey v. Hammock.....	22, 111

J.

Jack v. Martin.....	601
Jacks v. Smith.....	25

	PAGES.
Jackson v. Anderson.....	292
v. Bard.....	554
v. Bronson.....	184
v. Bry.....	778
v. Cunningham.....	88
v. Hale	42
v. Hansen.....	718
v. Hubbard	85, 427
v. Miller.....	554
v. Rutherford	36, 417
v. Sparks.....	18, 218
v. Stockard	118
v. Virgil.....	282, 302, 554
Jacob v. Nathan.....	762
Jacobs v. Parker.....	627
Jacobson v. Metzgar.....	789
Jacoby v. Laussatt,	256, 269, 274,
	512, 523
Jagger v. The L. & G. Mfg. Co.	754
Jarrard v. Harper.....	610, 629
James v. Dulap.....	391
v. Fowler	295, 438, 582
v. Griffin	126
v. Stratton	110
v. Van Duyn	568
Jamison v. Capron	224, 767
v. Moore	503
Janner v. Joliffe	147
Jansen v. Acker.....	344
v. Effey,	397, 399, 401,
	632, 639
Jaques v. Sanderson.....	325, 690
Jaquith v. Davidson.....	461
Jarroll v. McDaniel.....	114
Jefferson v. Chase.....	102, 123
Jeffrey v. Bastard.....	334, 363
Jeffreys v. Greeley.....	584
Jenkins v. Steanka,	212, 559, 604
Jenney v. Jenney.....	425
Jennings v. Gage,	122, 128, 129,
	132, 138, 218
v. Hare.....	769
v. Johnson,	371, 457,
	533, 534, 541
v. Prentice.....	560, 568

	PAGES.
Jennison v. Haire, 356, 371, 675, 725, 731, 792, 793	
Jessop v. Miller.....	122, 242, 258
Jetton v. Smead, 226, 409, 458, 555, 632	
Jewell v. Lamareaux.....	693, 707
Jimison v. Reifsneider.....	438
Jimmerson v. Green.....	65, 68
Joint School Dist. v. Kemen, 34, 72, 300	
Johnson v. Barber.....	194
v. Carnley, 18, 52, 54, 69, 71, 284, 285, 440	
v. Elwood.....	182
v. Evans.....	110
v. Fellows.....	658
v. Garlick.....	37, 40
v. Howe, 187, 253, 395, 409, 551, 603, 644, 647	
v. Johnson.....	247
v. Marshall, 497, 522, 525	
v. McIntosh, 72, 204, 212	
v. McLeod.....	606
v. Monell, 131, 133, 298, 379	
v. Moore.....	582
v. Neal, 55, 68, 212, 284, 297, 314, 565, 643, 650	
v. Peck.....	215, 217, 218
v. Prussing.....	38, 61, 94
v. Sumner.....	523
v. Weatherwax.....	765
v. Weedman.....	473
v. Willey.....	102
v. Wing.....	177, 178
v. Wollyer.....	393
Jones v. Allen.....	249, 520
v. Anderson.....	55, 59, 606
v. Clouser.....	177
v. Dodge.....	46, 119, 423
v. Evans.....	88
v. Gundrin.....	25
v. Hicks.....	539

	PAGES.
Jones v. Julian.....	597
v. Lowell.....	485
v. Peasley.....	381
v. Pullen.....	606, 607
v. Rahilly.....	398, 468
v. Sinclair.....	79
v. Smith.....	782, 794
v. Spears.....	253, 265, 550
v. Taylor.....	93
v. Thomas.....	182, 183
v. Thompson.....	110
v. Ward.....	149, 587
Joplin v. Carrier.....	220
Jordan v. Dennis.....	690
v. Owen.....	165
v. Thomas.....	206, 647
Josslyn v. McCable.....	188, 635
Joyner v. Miller.....	83, 436
Judd v. Fox, 106, 154, 165, 166, 172, 388, 444	
Judge of Probate v. Heydock, 786	
June v. Payne.....	808
Just v. Porter.....	459

K.

Kaehler v. Dobberpuhl.....	168, 301
Kaeffner v. Stratton.....	635
Kafer v. Harlow.....	756, 802, 805
Kammon v. Lane.....	156
Karr v. Barstow.....	308, 663
Karthus v. Owings.....	42, 805
Kaster v. Pease.....	262
Kates v. Thomas.....	641
Kauffman v. Schilling, 21, 209, 210, 291, 294	
Kaufman v. Wessel.....	749, 785
Kautzler v. Albertson.....	809
Kavanagh v. Phelps.....	561
Kay v. Noll.....	436, 549
Kayser v. Bauer, 370, 382, 647, 678, 701, 752	
Keaggy v. Hite, 420, 483, 512, 513	
Keegan v. Cox.....	118, 223

	PAGES.
Keeler v. Field.....	125
Keep v. Kaufman.....	476
v. Moore.....	274, 424
Keesling v. McCall.....	312
Kehoe v. Rounds, 279, 282, 458,	648
Keite v. Boyd.....	425
Keith v. Bradburry.....	391
v. Johnson.....	341
Kellar v. Carr.....	763, 785
Kelleher v. Clark.....	270, 701
Keller v. Boatman, 308, 411, 611,	707
Kelley v. Burchfield.....	140
v. McKibben, 469, 500, 605,	629
Kellogg v. Adams.....	71
v. Churchill, 148, 150, 166	
v. Freeman.....	441
v. Olson.....	253
v. Turpie.....	136
Kelly v. Altemus.....	476
v. Bliss.....	304
Kelsey v. Griswold.....	245
Kelso v. Saxton.....	324, 648
Kenash v. Lane.....	425
Kenaston v. Moore.....	290
Kendall v. Fitts, 359, 451, 462,	463, 615
v. Stokes.....	663
Kendrick v. Watkins.....	687
Kendy v. Green.....	119
Kenley v. Commonwealth, 759, 763,	785
Kennedy v. Beck.....	323, 707
v. Brent.....	331
v. Brown.....	756
v. Clayton.....	400, 437
v. Shaw.....	398, 400
v. Strong.....	512, 523
v. Whitehead.....	539
v. Whitmore.....	523
v. Whitwell.....	512
Kennett v. Fickle, 400, 421, 479,	562

	PAGES.
Kennet v. Robinson.....	242, 254
Kenney v. Crocker.....	163
v. Degman.....	185
v. Mallory.....	360, 361
Keog v. Daniel.....	188
Kerby v. Meller.....	60
Kerchival v. Harney.....	752, 763
Kerley v. Hume, 69, 256, 561, 639	
Kern v. Huidekaper, 165, 315, 408	
Kerr v. Drew.....	434
Kerrigan v. Ray.....	577
Kersenbrock v. Martin.....	531
Kesler v. Hayes.....	353
Ketcham v. Hill.....	553
Ketchum v. Brennan.....	574, 606
Keys v. McNulty.....	730
Keyser v. Harbeck.....	132, 218
v. Watterburry.....	168
Kidd v. Beldin.....	60
Kidder v. Merryhew.....	721, 804
Kiefer v. Carrier.....	57, 261
Kier v. Peterson.....	189
Kilby v. Wilson.....	131, 217, 218
Kilgore v. Smith.....	421
Killey v. Scannell.....	252
Killian v. Carrol.....	53, 81
Kimball v. Adams.....	44, 443
v. Citizens Bank.....	689
v. Cunningham, 128, 129,	136
v. Farnum.....	268
v. Lohmas.....	198, 199
v. Thompson, 115, 118,	120, 227, 650
v. True.....	287, 352, 363
Kimberly v. Patchen.....	209, 210
Kimmel v. Kint.....	355, 683, 716
Kincaid v. Bradshaw.....	353
Kindy v. Green.....	21, 118, 227
King v. Baldwin.....	107, 758
v. Chase.....	331, 666
v. Conneoy.....	557
v. Ford.....	177
v. Hoare.....	663
v. Mason.....	136

	PAGES.		PAGES.
King v. Orser, 39, 261, 343, 311,	538	Krause v. Curtis.....	408
v. Ramsey, 609, 645, 652,	789	v. Cutting.....	601, 602
Kingsbury v. Buchanan, 16, 56, 402		Krosnopolski v. Paxton.....	42
Kingsbury's Exrs. v. Lane's, 13, 14		Krug v. Herod.....	549, 557
Kingsford v. Merry.....	218	Kruger v. Pierce.....	334, 708
Kingsland v. Chrisman.....	91	Kuehne v. Williams.....	47
Kinney v. Crocker.....	162	Kuhn v. Newman.....	109
Kinsey v. Leggett.....	80, 125	v. Spellacy.....	737
Kipp v. Wiles.....	512	Kuhns v. Gates.....	255, 552
Kirby v. Miller.....	68	Kunkle v. State.....	151
Kirch v. Davis.....	190, 191, 304	Kyle's Admr. v. Kyle.....	554
Kircher v. Schalk.....	184		
Kirk v. Morris.....	3, 84	L.	
Kirkham v. Hargraves.....	249	Laborde v. Rumpa.....	456
Kirkpatrick v. Cooper, 293, 296,	302, 599	LaCrosse v. Robertson.....	533
v. Snyder.....	58	Lacy v. Farnham.....	282
Kirskey v. Friend.....	737	v. Gibony.....	92
Kitchell v. Vanader.....	103	v. Weaver.....	19, 20, 21, 46
Kitchen v. Clark.....	272	Ladd v. Billings, 110, 114, 118, 227	
Kittridge v. Holt.....	149	v. Brewer.....	469, 479, 645
Klæty v. Delles.....	422, 455, 758	v. Newell.....	625
Kline v. Kline.....	120	v. North.....	83, 231
Kloeckner v. Bergstrom.....	143	v. Prentice, 675, 716, 717,	725, 753, 759
Klotz v. Macrady.....	112	Laffin v. Griffith.....	93
Knapp v. Colburn.....	724, 731	LaFontain v. Green.....	55
v. Roche.....	313	LaGrange v. State Treasurer..	46
v. Smith.....	39, 231, 233	Lamb v. Day.....	452
v. White.....	64	Lambden v. Conoway, 355, 356,	735
Kneas v. Fitler.....	340	Lambert v. McCloud.....	437
Knott v. Cunningham.....	668, 703	v. McFarland.....	604, 632
v. The People.....	379	Lamberton v. Foote.....	610
Knowles v. Lord.....	349	Lammers v. Meyer.....	398, 609
v. Pickett.....	691	Lamotte v. Wisner.....	37, 55
v. Pierce.....	619	Lamphrey v. Munch.....	574
Knox v. Hellums.....	63	Lamping v. Kunon.....	240
v. Noble.....	288, 670	v. Payne.....	405, 631
Kofer v. Harlow.....	559	Lamy v. Remuson, 327, 460, 558,	692
Koper v. Cotton.....	618	Lam Yip v. Ching Sing.....	143
Kortwright v. Com. Bank.....	522	Lance v. Cowin.....	215
Kouns v. Bank.....	367	Lander v. Ware, 389, 503, 504,	506
Kramer v. Matthews, 18, 662, 665			
Krauert v. Simon.....	138		

PAGES.	PAGES.
Landers v. George, 392, 400, 446, 645,662, 775, 797	Lazarus v. Tribble..... 748
Landler v. Bresnahan..... 210	Lea v. Terry..... 291
Lane v. Chadwick..... 270	Leadbetter v. Kendall..... 338
v. Foulk..... 722	Lear v. Edmonds..... 24
v. Sparks..... 400	Learned v. Bryant..... 104
Lang v. Daugherty..... 629	L. E. & St. L. R. R. v. Payne, 286, 301, 310
Langdoc v. Parkinson, 357, 717, 719, 784	Leavitt v. Metcalf.....150, 153
Langdon v. Buel..... 85	Lecky v. McDermott.....102, 397
v. Paul.....184, 195, 198	Ledford v. Weber..... 802
Lanman v. Des Moines..... 175	Ledley v. Hays.....243, 252, 264
Lansing v. Sherman..... 664	Lee v. Gould..... 256
Lanyon v. Woodward.....20, 658	v. Grimes..... 794
LaPlace v. Aupoix.....253, 260	v. Hastings.....632, 756, 759
Latham v. Blakely..... 184	v. Portwood, 216, 217, 219, 437
Lathrop v. Blake..... 61	Leese v. Sherwood..... 693
v. Bowen.....37, 691	Lefler v. Field..... 436
v. Cook.....11, 147, 150	LeFlore v. Miller.....58, 79
v. Locke..... 243	Lehman v. Kellerman, 35, 56, 195
Latimer v. Motter.....9, 538	Leibert v. McHenry..... 68
v. Wheeler.....243, 557	Leighton v. Brown, 515, 559, 724, 762, 773, 777, 784, 786, 805
Laubenheimer v. McDermott, 86	v. Harwood.....157, 158
Laughlin v. Fairbanks..... 88	v. Stewart.....460, 624
v. Kavanaugh..... 708	Lendauer v. Teeter..... 462
v. Main..... 164	Lenox v. Fuller..... 661
v. Thompson, 331, 338, 384, 410, 418	Lentz v. Flint..... 431
Laurendan v. Fugelli..... 195	Leonard v. Hannon..... 326
Lavacool v. Boughton..... 172	v. Maginnis, 264, 467, 633
Lavelle v. Lawry..... 609	v. Stacy..... 659
Lavigne v. Russ..... 388	v. Stickney..... 199
Lawrence v. Burnham, 110, 114, 116, 291	v. Tidd..... 250
v. Coyne..... 152	v. Whitney, 88, 466, 538, 570, 654, 724, 775, 788, 801
v. Featherston..... 722	LeRoy v. East Saginaw Ry., 168, 171, 172, 248, 251, 428
v. Maxwell..... 243	Leroy v. McConnell.....289, 561
v. State..... 81	Lesser v. Norman..... 461
Lawson v. Lay.....12, 248	Lester v. East.....58, 64
v. Patch..... 186	v. McDowell.....68, 394, 562
Lawyer v. Baldwin..... 48	Letson v. Dodge..... 765
Lay v. Lawson..... 465	
Laymon v. Hendrix..... 631	
Layward v. Warren..... 230	
Lazard v. Wheeler.....226, 227	

	PAGES.		PAGES.
Leven v. Smith.....	122, 125	Livermore v. White.....	81
Leverty v. Snethen.....	243	Livingston v. Farish.....	20
Levi v. Darling.....	402	v. Smith.....	411
Levin v. Russell.....	310, 312	v. Superior.....	356, 358
Levy v. Cowan.....	111	Livor v. Orser.....	87, 153, 538
Lewis v. Blair.....	349	Lloyd v. Brewster.....	131, 139
v. Brackenridge.....	309, 385	v. Goodwin.....	68, 541
v. Buck.....	162, 609, 653	Lobdell v. Stowell.....	522, 525
v. Burnham.....	577	Locke v. Hedrick.....	552
v. Lewis.....	602	Lockhart v. Little.....	291
v. Marten.....	588	Lockwood v. Bull, 61, 83, 242, 249	
v. Mason.....	78	v. Perry, 380, 381, 700,	
v. Masters, 241, 244, 245,		747, 763	
248, 562, 588		Loeschman v. Machin, 93, 102,	
Lewisville v. Holborn.....	165	255	
Libby v. Main.....	742	Logan v. Houlditch.....	260
v. Murray.....	37, 40, 41	Loker v. Damon.....	509, 541
Lickfelt v. Kopp.....	689	Lomme v. Sweeney, 725, 747, 791,	
Lightfoot v. Jordan.....	230	809	
Lill v. Stookey.....	641, 683, 688	Long v. Cockrell.....	536, 537
Lilliard v. Whitaker.....	512, 523	Lood v. Green.....	142
Lillie v. Dunbar.....	194	Loomis v. Foster.....	396
v. McMillian.....	466	v. Tyler.....	16, 391
Lills, &c., v. Russell.....	261, 577	v. Youll, 283, 285, 549,	
Linch v. Welsh.....	206	582	
Lindauer v. Teeter.....	601	Lorch v. Altman.....	419
Linder v. Brock.....	361, 782, 802	Lord v. Bicknell.....	335
Lindley v. Kelley.....	20	v. Poor.....	332
v. Miller, 28, 387, 389,		Lorton v. Fowler.....	95
390, 420, 444		Lothrop v. Locke.....	557
Lindsay v. Blood.....	720	v. Southworth.....	758
v. Perry.....	49	Lougee v. Colton.....	394
Lindsay Exrs. v. Armfield.....	331	Louthain v. Fitzer...231, 232, 557	
Lindsey v. Wyatt.....	561	v. May.....	573
Ling v. King.....	182	Loveday v. Mitchell.....	68
Lingham v. Warren.....	24	Lovejoy v. Bright.....	361, 747
Lininger v. Herron.....	95	v. Jones.....	102
Link v. Clemmens.....	361, 739	v. Murray.....	668, 703
Linn v. Wright.....	581	Lovensohn v. Ward.....	16, 423
Linscott v. Trask.....	574	Lovett v. Burkhardt.....	373, 377
Linsley v. Bushnell.....	499	Lovigne v. Russ.....	388
Lisenby v. Philips.....	115	Low v. Freeman.....	141, 553
Litchfield v. Halligan.....	409	v. Martin, 46, 213, 214, 291,	
Litchman v. Potter.....	294, 325	608	
Litterel v. St. John.....	247	Lowe v. Brigham.....	639, 674, 690

[illegible]

	PAGES.		PAGES.
Marson v. Plummer.....	131	Maxwell v. Light.....	577
Marston v. Baldwin.....	3, 131	May v. Johnson.....	801
v. Roe.....	188	Mayberry v. Cliffe, 380, 382, 458,	
Martin v. Bagley.....	96, 644	460, 469, 478, 485,	
v. Bolenbaugh.....	736	496, 505, 516, 522,	
v. Hill.....	93	542	
v. Mott.....	173, 174	Mayhue v. Snell.....	36, 696
v. Porter, 204, 206, 487,		Mayo v. Winfree.....	26
524, 526		McAdams v. Walbran.....	258
v. Ray.....	407, 415, 586	McAllister v. Clopton.....	667
v. Scofield.....	196	v. Lawler.....	182
v. Thomas.....	789	McArdle v. McArdle.....	445
v. Watson, 61, 83, 297,		McArthur v. Currie.....	70, 257
394, 402, 404, 564		v. Hogan.....	284
Martinez v. Martinez.....	9, 298	v. Howett.....	480, 688
Martz v. Putman.....	145, 584	v. Lane, 112, 113, 432,	
Marx v. Woodruff.....	177	439, 686	
Mason v. Richards, 632, 639, 682,		v. Oliver.....	15, 113
725, 756, 793		v. Sane.....	639
v. Sumner, 485, 675, 782,		McAuliffe v. Mann.....	188
795		McAvoy v. Medina.....	81
Masson v. Bovet.....	129	McBeth v. Van Sickle.....	747
Masterson v. City of Brooklyn, 501		McBrayer v. Dillard.....	566
Matheny v. Mason.....	106	McBrian v. Morrison.....	40
Mather v. Hutchinson.....	565	McBride v. McLaughlin.....	503
v. Trinity Church, 189, 193,		McCabe v. Morehead, 455, 503, 508	
195		McCartney v. Wilson.....	98
Mathias v. Sellers.....	274, 416, 709	McCarty v. Gage.....	341, 404
Matlock v. Fry.....	46	v. Quimby.....	472
v. Straughn.....	413, 652	v. Vickery.....	132
Mattenwan Co. v. Bentley, 129, 131		McCauley v. Offutt.....	768
Matthews v. Cole.....	518, 520	McChing v. Bergfield.....	419
v. Sherwell.....	483	McClain v. Cherokee.....	299
v. Storms, 354, 733, 741		McClaughry v. Cratzenberg, 168,	
Mattingly v. Crowley.....	346, 641	172, 175, 279,	
Mattison v. Bancus.....	95	282, 285, 302	
Mattoon v. Pearce, 440, 467, 778,		McClellen v. Marshal.....	641
803, 805		McColgan v. Huston.....	321
Mattson v. Hanisch.....	391, 600	McCombie v. Davies.....	79, 250
Matzon v. Griffin.....	185	McConnell v. Kibbe.....	527
Maxey v. White, 231, 301, 327,		McCormick v. McCormick.....	638
686		v. Riewe.....	187
Maxham v. Day.....	49, 342	McCourt v. Bond.....	325, 569
Maxon v. Perrott.....	153, 231, 329	McCoy v. Anderson.....	168, 171
Maxwell v. Hannon.....	705	v. Beck.....	285

	PAGES.		PAGES
McCoy v. Cadle.....	18, 79, 89	McGuire v. Benoit.....	89
v. Cornell.....	483	v. Gallegan.....	472, 691
v. Reck.....	165, 311	McHugh v. Robinson.....	41
McCraw v. Welch.....	402, 569	McIlvaine v. Holland, 392, 407,	640
McCue v. Tunstead.....	635	McInery v. Samuels.....	690
McCullough v. Hellwig.....	272	McIntosh v. Parker.....	417
McCurdy v. Brown.....	57, 64	McIntyre v. Carver.....	79
McDaniel v. Allen.....	46	v. Eastman, 422, 581,	709, 759
v. Fish.....	698	McIsaacs v. Hobbs, 33, 57, 68, 95,	96
v. Fox.....	538	McKay v. Batchellor.....	174
McDermott v. Doyle.....	354, 750	v. Draper.....	706
v. Isbell, 688, 718, 765,	792	McKeal v. Freeman.....	637, 638
McDonald v. Holmes.....	232	McKean v. Cutter.....	451, 615
v. McDonald.....	584	McKee v. Judd.....	226
v. North, 467, 471, 500,	508, 511	v. Metraw.....	385
v. Norton.....	504	v. Pope.....	761
v. Prescott.....	404, 407	McKennon v. May.....	56, 210
v. Scaife.....	504, 505	McKesell v. Chaney.....	636
v. Smith.....	219, 247	McKesson v. Sherman.....	302
McDougall v. Travis.....	228	McKinney v. Green.....	657
McDowell v. Bissell.....	213	McKinnis v. L. R. M. R. & T.	
McEldury v. Flannigan, 46, 113,	116	R. R.....	202
McElvain v. Mudd.....	424, 466	McKinnon v. McEwan.....	478, 542
McEvoy v. Hussey.....	48, 299	McKnight v. Dunlap.....	408, 636
McFadden v. Fritz, 410, 666, 738,	791	v. Morgan.....	217
v. Ross.....	18, 665, 791	McLain v. Hall.....	691
McFarlan v. McClellan.....	563	McLarren v. Thompson.....	453
McFarland v. McNitt.....	717, 724	McLaughlin v. Piatti, 74, 104, 119	
McFerrin v. Percy.....	418	McLean v. Cook.....	341
McFitridge v. Piper.....	126	McLean Co. v. Long.....	487
McGavock v. Chamberlain, 457,	478, 480	McLeod v. Gloyd.....	688
McGee v. Given.....	340	v. McGhie.....	483
v. Overby.....	411	v. Oates.....	147, 148
McGill v. Howard.....	419	McMahill v. Walker.....	66
McGinnis v. Hart.....	457, 637, 728	McMillan v. Larned.....	233, 327
v. Savage, 123, 203, 482		McMillian v. Baker.....	723
McGlothlin v. Madden.....	74	McMorris v. Simpson.....	101
McGoon v. Ankeny.....	226	McMurchy v. O'Hair.....	790
McGough v. Wellington.....	554	McNail v. Zeigler.....	125, 134
McGuffie v. Dervine.....	363	McNamara v. Eisenleff.....	654
		McNeil v. Arnold, 240, 247, 251,	255, 267

PAGES.	PAGES.
McNeal v. Leonard..... 643	Meshke v. Van Doren522, 538
McNorton v. Akers.....89, 535, 571	Metton v. McDaniel..... 8
McPeake v. Hutchinson..... 554	Metzner v. Graham 374
McPherson v. McElhinch, 306, 388, 389	Mexal v. Dearborn..... 315
McRae v. McLean, 379, 747, 763, 798	Meyer v. Mosler..... 225
McTaggart v. Rose..... 410	Meyer Bros. v. Lane.....304, 385
McVey v. Burns..... 685	Meyers v. Schemp..... 186
Mead v. Johnson.....141, 210	Miches v. Tousley..... 152
v. Kildoy52, 60	Middleton v. Bryan.....464, 558
Meany v. Head.....34, 393	v. Quigley..... 601
Meaux v. Rutgers..... 355	Mikesell v. Chaney.....674, 682
Meeker v. Chicago Cast Steel Co..... 524	Miles v. Davis.....737, 763
Meixell v. Kirkpatrick..... 638	v. Stevens..... 25
Melcher v. Lamprey, 149, 150, 166	v. Walther.....91, 666
Meldrum v. Snow62, 122	Milholland v. Pence..... 295
Mellen v. Baldwin..... 426	Miller v. Adsit..... 35, 59, 71, 224
Mellor v. Spateman..... 527	v. Baker 256
Melton v. McDonald.....56, 66	v. Bogart385, 708
v. Smith 137	v. Cashman 349
Melvin v. Winslow....440, 464, 807	v. C., M. & St. P. R. R... 299
Menckens v. Menkens..... 483	v. Commissioners 728
Mendlesohn v. Smith..... 17	v. Commonwealth 360
Mennie v. Blake.....3, 12, 14, 382	v. Darling..... 214
Mercer v. James594, 630	v. Davis..... 343
v. Jones 523	v. Eatman..... 118
M. & T. Bank v. F. & M. Bank 513	v. Foy 152
Meredith v. Kennard..... 643	v. Garling..... 508
v. Knott.....68, 691	v. Hahn..... 308
Merrell v. Denton 89	v. Hudson 165
Merriam v. Lynch.....261, 697	v. Jones, 36, 54, 55, 71, 606
Merrill v. Butler456, 462	v. Krueger..... 608
v. Dixon..... 198	v. Langton..... 426
v. Wedgewood, 399, 400, 649	v. Le Piere..... 63
Merritt v. Lumbert..... 425	v. McGelm..... 174
v. Lyon..... 570	v. Moses 348
v. Miller 151	v. Sleeper.....12, 393, 435
v. Thompson..... 692	v. Trets 601
Mersereau v. Norten..... 110	v. Warden33, 431
Mervine v. White..... 87	v. White9, 373, 376
Messer v. Bailey, 349, 453, 462, 463	v. Whitson, 469, 475, 515, 520
	Milliken v. Selye, 148, 279, 280, 282, 352
	Milling v. Butts..... 574
	Mills v. Kan. Lumber Co., 550, 642

	PAGES.		PAGES.
Mills v. Gleason, 647, 683, 718, 730,	759	Moore v. Herron, 380, 624, 640,	690
v. Long.....	785	v. Hitchcock.....	79
v. Malott.....	115	v. Jackson.....	749
v. Mills.....	600, 605	v. Kepner, 8, 399, 496, 653	
v. Redick.....	186, 187, 197	v. McKibbin.....	101
Millspaugh v. Mitchell, 240, 253,	264	v. More.....	31
Milton v. McDaniel.....	574	v. Ryan.....	424
Minchrod v. Windoes, 291, 294, 310		v. Sample.....	110
Minkwitz v. Steen.....	476	v. Schultz.....	542
Minthon v. Lewis, 475, 477, 552,	559, 560, 584	v. Shenk, 457, 458, 564, 655	
Mires v. Solebay.....	260	v. Stevens.....	447
Mitchell v. Alestree.....	645	v. Vrooman.....	614
v. Burch, 498, 503, 508,	780, 797	v. Washburn.....	75
v. Franklin.....	27	v. Westervelt.....	377
v. Hinman, 51, 75, 82,	418, 433	Moorhouse v. Donaca.....	250, 581
v. Ingram.....	737, 740	Moorman v. Quick, 52, 57, 71, 285	
v. Roberts, 11, 14, 37, 39,	52, 55, 148, 232, 393,	Moors v. Parker.....	792, 793
678		More v. Clepson.....	291
v. Smith.....	160	Moreley v. Anderson.....	32
v. Williams, 248, 257, 259		Morey v. McGuire.....	184
v. Worden.....	138	Morford v. Unger.....	169
Mitchum v. Stanton, 722, 754, 760,	762	Morgan v. Bradley.....	226
Mix v. Kepner.....	454, 499, 519	v. Congdon.....	79
Mixer v. Cook.....	125	v. Craig.....	34, 147, 159
Mobley v. Letts.....	97	v. Durfee.....	341
Moffatt v. Green.....	58	v. Evans.....	337
Mohn v. Stoner.....	78, 293	v. Gregg.....	209, 522
Monroe v. Heintzman.....	722	v. Griffith.....	718, 720
v. Standish.....	722	v. Hedges.....	116
Monteith v. G. W. P. Co.....	107	v. Jandon.....	523
Montgomery v. Black.....	644	v. Morgan.....	300
Moody v. Whitney.....	182, 488	v. Pierson.....	109
Moore v. Watts.....	321	v. Powell.....	487
Moore v. Bowmaker.....	761	v. Reynolds, 457, 473,	475, 477
v. Campbell.....	753	v. Spangler.....	236, 422
v. Crocket.....	441	Morgner v. Biggs.....	58, 563, 574
v. Devol.....	599, 709	Moriarity v. Stafferan, 9, 127,	128, 129, 137
v. Erie R. R. Co.....	209	Morin v. Bailey.....	441
		Morish v. Mountain.....	644
		Morril v. Corbin.....	134
		Morrill v. Titcomb.....	554
		Morris v. Burley.....	598

PAGES.	PAGES.
Morris v. Baker, 335, 336, 463, 538	Munis v. Herrera.....155
v. Cannon..... 42	Munroe v. Merrill..... 347
v. Danielson.....51, 71, 574	v. Stickney..... 527
v. DeWitt.....166, 695, 698	Munsell v. Flood..... 654
v. Matthews..... 721	Munson v. Harrohn..... 159
v. Pugh.....242, 258	Murdock v. Will.....287, 363
v. Rucks..... 263	Murphy v. Jenkins..... 460
v. Van Voast.....83, 359	v. Sherman, 155, 265, 438, 469
Morrison v. Austin..... 634	v. Tendall..... 35
v. Blodgett..... 110	v. Wilson..... 339
v. Judge..... 87	Murray v. Burling..... 47
v. Lewis..... 310	v. Cone..... 554
v. Lombard.....38, 39	v. Paisley..... 394
v. Yancey.....529, 778	Musgat v. Pumpelly.....273
Morse v. Hodsdon, 356, 740, 743, 792	Musgrove v. Beckendorff..... 525
v. Pike..... 292	v. Hall.....32, 148
v. Reed.....75, 177, 178	Musprot v. Gregory..... 389
v. Stone.....539, 645	Myers v. Clark..... 335
Morseman v. McKenley..... 135	v. Credle, 39, 229, 233, 237
Morton v. Baldwin..... 69	v. Mayfield..... 389
v. Sweetser..... 693	v. Moulton..... 651
Moseley v. Andrews..... 152	v. Parker..... 723
v. Baker..... 441	Myrick v. Bell..... 241, 242
Moser v. Jenkins.....247, 411	
Moses v. Morris..... 231	
Mosher v. Vehue..... 185	
Moulton v. Bird.....394, 644	
v. Smith.....602, 661	
Mound v. Monmouth..... 223	
Mount v. Derick.....253, 259, 260	
Mowrer v. Helferstine..... 170	
Mowry v. Walsh.....142, 217, 218	
Moychan v. Moore..... 273	
M. R. R. v. Finney..... 507	
Mt. Carbon Coal Co. v. Andrews, 170, 172, 174, 175, 285, 404, 406	
Muck v. Folkroad..... 300	
Muggridge v. Eveleth.....54, 55, 68	
Mulheisin v. Lane..... 83	
Mulholm v. Cheney...147, 149, 150	
Muller v. Jewell..... 600	
Munday v. Vail..... 666	
	N.
	Nalor v. Collinge..... 186
	Namee v. Braley..... 392
	Nash v. Fredericks..... 226
	v. Mosher, 10, 102, 103, 132, 218
	Nashville v. Alexander, 308, 348, 460, 620
	National Bank v. Bayley..... 62
	v. Crocker...62, 70
	v. Dearborn, 59, 62, 70
	Neal v. Williams..... 218
	Neblet v. Smith..... 190
	Neely v. Lyon..... 11
	Neff v. Thompson, 12, 24, 55, 151, 256, 440
	Neis v. Gillen.....395, 458, 637
	Nellis v. Bradley.....128, 129

PAGES.	PAGES.
Nelson v. Bowen..... 600	Nicholson v. Mitchell..... 378
v. Iverson 249	Nickerson v. Cal. Stage Co..... 759
v. Luchtemeyer.....684, 806	v. Chatterton, 15, 637,
v. McIntyre..... 561	641, 728, 732, 756
v. Smith..... 178	Nieler v. Kelly 525
Nesbitt v. St. Paul, 202, 204, 220,	Nightingale v. Scannell....509, 538
509	Nisbet v. Patton 259
Nettleton v. Jackson..... 433	Niven v. Burk..... 89
Newcomer v. Alexander..... 286	Noble v. Adams.....32, 131, 132
Newell v. Hayden..... 152	v. Epperly, 57, 457, 565,
v. Horn 554	582, 655, 750
v. Newell, 241, 242, 247,	Noe v. Gibson..... 157
251, 290, 313, 316	Nolan v. Jones131, 576
Newell Mill Co. v. Muxlow, 530, 711	Noland v. Leech 606
Newhall v. Dunlap..... 31	Noles v. Marable..... 104
Newkirk v. Dalton.....216, 220	Nollkamper v. Wyatt.....447, 557
Newland v. Willetts..... 368	Norten v. The People.....36, 224
Newlein v. Reed 615	North v. Turner 226
Newman v. Bean 110	Northampton Paper Mills Co.
v. Bennett, 223, 243, 259,	v. Ames..... 184
260	Northrup v. McGell 486
v. Jackson 206	v. Trask 196
v. Jenne247, 587	Norton v. Lawrence..... 746
v. Jones 253	v. Pettibone..... 554
v. Tymeson..... 96	v. Rockey..... 177
Newton v. Brown 427	v. Simonds..... 63
v. Gardner.....116, 223	Nosser v. Corwin 808
v. Howe..... 211	Nottingham v. Vincent..... 620
Niagara Elevator Co. v. Mc-	Novion v. Hallett..... 156
Namara.....32, 169, 534	Nowlen v. Colt..... 214
Nicholas v. Chapman 255	Noxon v. Hill509, 538
Nicholas Ins. Co. v. Alexander 457	Nunan v. City, &c.,..... 316
Nicholls v. Hazel 688	Nunn v. Goodlett, 348, 356, 357,
Nichols v. Dewey 198	728, 735, 738, 765, 792
v. Dusenbury, 388, 389,	Nutting v. Nutting..... 139
447, 631	Nye v. Liscomb 366
v. Mase..... 47	N. Y. Guarantee Co. v. Flynn, 458
v. Michael, 128, 129, 131,	467, 470
230, 344, 423, 439	
v. Nichols..... 309	
v. Patten..... 38	
v. Pinner.....131, 134, 138	
v. Standish282, 792	
Nicholson v. Dyer.....73, 126, 549	
v. Hancock.....6, 577	

O.

Oaks v. Wyatt, 399, 401, 437, 563
O. & M. R. R. Co. v. Kerr..... 138
v. Noe...247, 270
Oberfelder v. Kavanaugh..... 567

	PAGES.		PAGES.
Parker v. Browning	158	Paul v. Hodges	301
v. Garrison	20, 36, 214	v. Luttrell, 3, 65, 244, 288,	289, 557
v. Hall	357	Pawell v. Bradlee	698
v. Middlebrook	245	Payment v. Church	569
v. Patrick	139	Payne v. Bruton, 221, 279, 282,	301
v. Simonds, 558, 675, 724,	765, 805	v. Drews	331
v. Storts	579	v. June	123, 603
Parkes v. Wilcox	536	Peaceable v. Watson	554
Parks v. Barkham	293, 302, 328	Peacock v. Haney	777, 784
Parlemon v. Young	66	v. Pittsburg	423
Parlin v. Austin	691	v. Rhodes	142
Parmalee v. Loomis	660	Pearce v. Twichell	224, 225, 463
Parnell v. Hampton	639	Pearsol v. Chapin	137
Parish v. Thurston	127, 131	Peake v. Conlan	250, 392, 574
Parratt v. Scott	718, 733, 739	Pearl v. Garlock	660, 782, 794
Parrish v. Morey	138	Pearson v. Eaton	250, 460, 616
Parsell v. Genesee Circuit Judge	684	Pease v. Smith	243
Parsley v. Huston	404, 406	Peck v. Bonbright	124, 596
Parson v. Wright	211	v. Jenness	160
Parsons v. Boyd	36, 104, 118	v. Wilson	724, 725
v. Dickinson	226	Peebles v. Morris	112
v. Harper	499	Peet v. Speicer	126
v. Hedges	437	Peirce v. Hill	342
v. Martin	512	Pelkington v. Trigg	45
v. Webb	102, 247	Pemble v. Clifford	732
v. Williams	721	Penington v. Streight	321
Partridge v. Philbrick	107	Pennington v. Chandler	564
v. Swazey	247	Penny v. Little	27
Patapsco v. Magee	472	Pennybecker v. Dougal	196
Patchen v. Wilson	224	v. McDougal, 186,	192, 197, 198, 486
Patchin v. Pierce	87	Penrose v. Green	667
Patten v. Bradley	28	Penton v. Robart	188
Patterson v. Fowler	395, 400	People v. Albany	169, 170, 174
v. Haight	420, 421	v. Core	287, 334, 363
v. Parsell	325	v. McCormick	796
v. Seaton	374, 381	v. McGarren	81
v. United States	601	v. Neill	379
Pattison v. Adams, 68, 284, 297,	298, 311, 314, 408,	v. New York	391, 640
447		v. Niagara	644
Patton v. Campbell	131, 134	v. Superior	375
v. Hammer	406	v. Supervisors of Che-	
Patty v. Mansfield	429	nango	175, 447
Paul v. Goodluck	785		

PAGES.	PAGES.
People v. Tripp.....634, 689	Phillip v. Allen..... 199
People, <i>ex rel.</i> Fletcher, v. Lee, 363	Phillipi Church v. Harbough, 360
Perigo v. Grimes.....692, 761, 782	Phillips v. Cooper..... 784
Perkins v. Barnes.....242, 243	v. Elwell..... 589
v. Oliver..... 306	v. Gastrell..... 200
v. Rudolph.....692, 757	v. Hall.....82, 151, 256
v. Smith, 279, 282, 292,	v. Harris, 33, 106, 147,
293, 296, 385, 386	337, 632
v. Thornberg..... 345	v. Hide..... 555
v. Walker..... 663	v. Kent..... 601
Perley v. Balch..... 136	v. Melville..... 605
v. Foster, 51, 52, 71, 75, 82	v. Monges..... 420, 422
Perreau v. Bevan, 335, 716, 718,	v. Scholl.....8, 574
720	v. Spotts.....343, 344
Perrin v. Clafin..... 339	v. Stroup..... 194
Perry v. Lewis..... 630	v. Townsend..... 447
v. Richardson, 147, 150, 165	v. Walker..... 147
v. Stone..... 62	v. Waterhouse..... 804
v. Tupper..... 684	Phipps v. Boyd.....389, 391
Persels v. McConnell..... 94	v. Martin..... 207
Person v. Wright, 115, 236, 247	Piazza v. White.....209, 529
311	Pick v. Wilson.....728, 730
Persse v. Watrous, 354, 355, 356,	Pickard v. Lowe..... 93
365, 717, 718, 720, 721,	Pickens v. Oliver.....304, 306, 455
765, 792	Pickering v. Pickering..... 112
Peters v. Elliott..... 70	Pickett v. Bridges, 460, 604, 607,
v. Parsons.....254, 408	677
v. Stewart..... 82	Pickins v. Sparks..... 434
Peters Box Co. v. Lesh..... 102	Pico v. Martinez..... 540
Peterson v. Espeset..... 249	v. Pico..... 413
v. Haight..... 422	Picquet v. McKay..... 59
v. Polk..... 585	Pierce v. Benjamin..... 512
Petre v. Duke.....4, 290	v. Hardee..... 720
Petrie v. Fisher, 348, 357, 765,	v. Hill.....3, 6, 155, 436
781, 806	v. Hoffman..... 572
Pettingill v. Merrill..... 49	v. Humphreys..... 370
v. Rideout..... 216	v. Jackson..... 116
Pettygrove v. Hoyt, 14, 355, 454,	v. King..... 718
716, 754, 762	v. Reh fuss.....324, 342, 385
Peyton v. Robertson..... 529	v. Roche..... 583
Pfennig v. Griffith.....663, 697	v. Stevens.....56, 68, 87
Phelan v. Bonham..... 177	v. Van Dyke, 6, 34, 242,
Phelps v. Owens..... 510	244, 247, 253, 264, 306,
Phenix v. Clark, 223, 279, 282,	313, 458, 653, 686
285, 286, 302, 528	Pike v. Goudell..... 388

PAGES.	PAGES.
Pilkington v. Trigg.....8, 47, 294	Powell v. DeHart 295
Pinkerton v. R. R. Co..... 522	v. Hinsdale...452, 619, 711
Piper v. Martin..... 187	v. Smith..... 190
Pipher v. Fordyce..... 375	v. Stickney.....295, 298
v. Johnson.....747, 759	v. Triplett..... 447
Pirani v. Barden, 12, 247, 305, 306, 352, 353	Power v. Kindschi..... 173
Pitt v. Owen..... 125	v. Tilford..... 203
Pitts v. Hale..... 425	Powers v. Bassford 257
v. Wilder..... 554	v. Benedict..... 127
Plainfield v. Batchelder..... 396	v. Florence.....27, 507, 542
Planer v. Smith..... 635	Poyen v. McNeal.....303, 327
Plant v. Crane 674	Pozzoni v. Henderson153, 538
Platt v. Brown..... 499	Prater v. Frazer, 52, 54, 71, 285, 297
Platte v. Hebbard..... 79	Prather v. Harlan.....739
Plunkett v. Moore.....355, 363	Pratt v. Donovan, 459, 632, 728, 756, 758
Poinsett v. Taylor 331	v. Parkman..... 62
Poland v. Henry 750	v. Tucker619, 641
Polite v. Jefferson..... 61	Prentice v. Ladd.....114, 116
Pollard v. Stoval..... 141	Prentiss v. Kennard..... 643
v. Thomas..... 145	Prescott v. Heilner.....294, 608
Pomeroy v. Trimper, 83,287, 292, 326, 425, 426	Presley v. Powers..... 249
Pool v. Loomis328, 348, 352	Preston v. Spaulding 134
v. Webster 299	Priam v. Barden..... 267
Poole v. Adkisson.....102, 241	Pribble v. Kent..... 102
Poor v. Darrah.....431, 703	Price v. Helyer 12
v. Woodburn, 128, 129, 133, 144, 453, 619, 624	v. Talley..... 118
Pope v. Jenkins.....419, 435	Prime v. Cobb, 241, 244, 246, 251, 267
v. Tillman.....290, 324	Pringle v. Phillips, 241, 244, 253, 563
Porter v. Chandler 438	Prior v. White..... 96
v. Dalhoff & Co.....164, 691	Proctor v. Tilton 124
v. Wellett.....453, 658, 753	Prosser v. Woodward, 284, 297, 446, 565, 645
Portland Bank v. Stubbs, 34, 271	Prout v. Root..... 92
Pothonier v. Dawson..... 259	Pryor v. Beck..... 733
Pott v. Oldwein, 42, 147, 156, 168, 173	Pugh v. Calloway, 83, 456, 463, 531
Potter v. Hall..... 319	Pullen v. Kensenger171, 172
v. James..... 719	Pulliam v. Burlingame, 106, 115, 400
v. Mardre.....31, 202, 203	Puncheon v. Hill..... 653
v. North.....4, 28, 290, 483	Purple v. Purple.....362, 366
Powell v. Bradlee, 60, 125, 133, 134, 138, 147, 217, 218, 700, 702	

	PAGES.
Purvis v. Moltz, 220, 244, 254,	257
Putnam v. Cushing	96, 206, 263
v. Parker.....	112
v. Wise.....	227
v. Wyley.....	54, 72
Pyle v. Pennock.....	189
v. Warren.....	240

Q.

Quackenbush v. Henry.....	38
Quin v. Wallace.....	24
Quincy v. Hall.....	387, 645, 649

R.

Radliff v. Dolinger.....	130
Rae v. McCrea.....	4
Rafferty v. Haldron.....	505
Raiford v. Hyde.....	147, 150, 392
Railroad Co. v. Roach.....	31, 32
Ralston v. Black.....	106, 337
v. Hughes.....	195
v. Strong.....	332
Rambo v. Wyatt.....	606
Ramsay v. Bancroft.....	56
Ramsdell v. Buswell, 11, 12, 14, 31,	230, 345
Ramsden v. Wilson.....	150
Ramsey v. Waters.....	602, 610
Rand v. Sargent.....	38
Randall v. Cook.....	96, 313
Rankin v. Greer.....	95
v. Kinney.....	183, 721, 725
Ranney v. Thomas, 655, 668, 682,	684, 769
Rapabje v. Emony.....	292
Raper v. Harrison.....	241, 245
Rapp v. Vogel.....	110
Rathbone v. Boyd.....	195, 660
Rathburn v. Ranney.....	321, 669
Rawley v. Brown.....	240
Ray v. Gardner.....	196
v. Horton.....	156

	PAGES.
Read v. Hutchison.....	136
v. Middleton.....	119, 294
Reavis v. Horner.....	677, 680
Rector v. Chievalier, 12, 30, 32,	425
Redding v. Page.....	242
Reddington v. Nunan.....	500
Redmon v. Hendricks, 71, 95, 394,	453, 562
Reece v. Hoyt.....	112
Reed v. Carpenter.....	707
v. Phillips.....	729
v. Reed.....	419
v. Wilson.....	655
Rees v. Coals.....	99
v. Morgan.....	601
Reese v. Harris, 36, 53, 68, 104,	291
v. Jared.....	197, 486
v. Mitchell.....	89
Reeside v. Fischer.....	147
Reeves v. Reeves.....	738, 766
Regina v. Birmingham.....	554
v. West.....	81
Reigert v. Voelker.....	305
Reiley v. Haynes.....	554, 702
Reinheimer v. Hemingway, 59, 112,	113, 114, 227
Reist v. Heilbrinner.....	425
Remdall v. Swackhammer.....	429
Remington v. Bailey.....	568
v. Cady.....	110
v. Cushen.....	299
Renfrew v. Hughes.....	785
Renick v. Boyd.....	182
Repine v. McPherson.....	567
Resch v. Senn.....	552
Reticker v. Wachtel.....	134
Reusch v. Demass.....	723
Reves v. Wilborne.....	380
Rewe v. Mitchell.....	692
Rex v. Lewis.....	334
v. Monkhouse.....	148
Reynolds v. Copeland, 272, 285,	311

	PAGES.		PAGES.
Reynolds v. Lounsbury.....	289	Riford v. Montgomery.....	220
v. McCormick, 46, 115,		Rigg v. Parsons.....	723, 805
485, 550, 585, 617		Rightmeyer v. Raymond...204,	206
v. Salle.....	34, 153	Riley v. Boston Water Power, 182,	
v. Schuler.....	191	202, 220, 245, 251	
Rhea v. Rines.....	141	v. Noyes.....	234
Rhines v. Phelps.....	375, 695	Ring v. Billings.....	193, 199
Rhoades v. Drummond.....	587	Ringgenberg v. Hartman.....	806
Rhoads v. Wood, 83, 457, 539,		Ringo v. Field.....	393, 551
540		Ripley v. Davis.....	468, 471, 512
Rhodes v. Bunts.....	602	v. Dolbier.....	249
v. Burkart.....	369	Ritchie v. Schenck.....	586
Riccards v. Cornforth.....	387	Rives v. Wilborn.....	377
Rice v. Cribb.....	91	Roach v. Binder.....	247, 553
v. Crow.....	65	v. Moulton.....	287, 363
v. Nickerson.....	500	Robbins v. Foster...609, 679, 806	
Rich v. Baker.....	196	v. Killibrew.....	632, 755
v. Penfield.....	227	v. Packard.....	483
v. Ryder, 54, 59, 111, 116,		v. Walters.....	473
367, 691		Roberts v. Berdell.....	240
v. Savage, 675, 677, 678, 699		v. Dauphin Bank, 44, 184,	
Richards v. Kirkpatrick.....	148	342	
v. Rape.....	677, 763	v. Johannas.....	409
Richardson v. Adkins.....	602	v. Marsen.....	425
v. Davis.....	709	v. Mason.....	499
v. Jones.....	420	v. Norris.....	88, 588, 663
v. Reed, 11, 39, 40,		v. Randel...31, 37, 39, 288	
223, 229, 230, 231,		v. Tennell.....	388, 444
455, 675, 678		v. White.....	90, 424
v. Smith.....	397, 404	v. Wyatt.....	61, 104, 228
v. Steele, 395, 399, 437		Robertson v. Davidson.....	724
v. York.....	194, 198	v. Jones.....	205, 487
Richey v. Burnes.....	520	Robins v. Kitchen.....	577
Rickabaugh v. Bada.....	500	Robinson v. Atlantic.....	157
Rickells v. Dorrel, 35, 44, 198, 200,		v. Austin.....	691
203, 204, 342		v. Baker.....	80, 273
Ricker v. Kelley.....	186	v. Burrows, 468, 471,	
Rickner v. Dixon.....	639	512	
Riddle v. Driver.....	206	v. Calloway, 51, 284, 297,	
v. Parke.....	400	400, 562	
v. Weldon.....	27	v. Champlin.....	105
Ridenour v. Beekman.....	549, 612	v. Fitch.....	296
Ridge v. Wilson.....	26, 27	v. Kruse.....	664
Riess v. Delles.....	596, 624, 655	v. Richards, 10, 527, 636,	
Riewe v. McCormick.....	35, 187	709	

	PAGES.		PAGES.
Robinson v. Mansfield.....	151, 256	Ross v. East Saginaw.....	168
v. Shatzley, 251, 528,		v. Hawthorn.....	154, 163, 164
709, 780		v. Johnson.....	249
v. Skipworth.....	251	Rotch v. Hawes.....	105
v. Soule.....	768	Roth v. Williams.....	273
v. The People.....	364	Rousdall v. Tewksbury.....	91
v. White.....	706	Roush v. Washburn.....	662
Rockey v. Burkhalter.....	370	Rowan v. Teague.....	603, 611
Rockwell v. Saunders, 52, 212, 394,		Rowark v. Lee.....	458, 632
408, 800		Rowe v. Bowen.....	429
Roderbaugh v. Cady.....	766, 792	v. Hicks.....	8, 234
Rodman v. Hendricks.....	460	v. Page.....	157
v. Nathan.....	144, 454, 620	v. Sharp.....	122
Rogers v. Arnold, 12, 31, 36, 53,		Rowell v. Klein.....	12, 33, 185
54, 55, 284, 393, 395,		Rowland v. Mann.....	393
406, 408, 411, 440, 545,		Rowley v. Bigelow.....	131, 139
565		v. Gibbs, 32, 440, 496, 497,	
v. Davis.....	230	519	
v. Hine.....	216, 249, 250	Rozell v. Denver L. W. Co.....	705
v. Kerr.....	2	R. R. Co. v. Noe.....	240
v. Ledwell.....	401	Ruck v. Morris, 290, 291, 292, 295,	
v. Whitehouse.....	62, 124	385	
Roland v. Gundy.....	102	Rucker v. Donovan.....	74, 126
Rolston v. Black.....	256	Ruse v. Harris.....	55
Romain v. Van Allen, 513, 522, 525		Rush Co. v. Stubbs.....	187, 199
Roman v. Stratton, 356, 718, 719,		Russ v. Butterfield.....	348
720, 792		Russell v. Allen.....	113, 114, 214
Romberg v. Hughes, 472, 475, 476		v. Butterfield.....	481, 648
Romick v. Perry.....	656	v. Minor.....	68
Ronge v. Dawson.....	6, 612	v. Place.....	665
Rooch v. Binder.....	255	v. Richards.....	192
Rood v. Hurd.....	690	v. Smith, 98, 444, 458, 497,	
Roof v. Stafford.....	10	509, 538	
Root v. Bonnema.....	213, 247	v. Walker.....	36, 417
v. French.....	139, 142, 218	Rutledge v. Corbin.....	749
v. Woodruff.....	288, 291	Ryan v. Akeley.....	794, 795
Roper v. Lane.....	64, 212, 437	v. Brant, 128, 129, 132, 136	
Rose v. Cash.....	18, 228	v. Clanton.....	93
v. Gallup.....	211, 528	Ryan-Ream Cattle Co. v.	
v. Pearson.....	424, 465, 606	Slaughter.....	174
v. Tolly.....	55, 612, 628, 630	Ryder v. Hathaway, 21, 206, 209,	
Roseberry v. Roseberry.....	693	210, 211, 212, 291, 493	
Rosen v. Fischel.....	742		
Ross v. Cassidy.....	73		
v. Draper.....	225		

S.		PAGES.	PAGES.
Saeltzer v. Ginther	360	Savacool v. Boughton	343
Saffel v. Wash, 34, 153, 649, 674		Savage v. Gunter	683, 757
Safford v. Gallup	661, 801	v. French	663
Sager v. Blain, 44, 45, 68, 292,		v. Perkins	242, 437
557		v. Russell	606
Sabnigham v. Carter	776	Savercool v. Farwell	526
Salkold v. Skelton	645	Savery v. Hoys	44
Salmon v. Fewell	182	Savile v. Roberts	452
Salter v. Richardson	734	Saw v. Levy	166
v. Sample	185, 186, 189	Sawtelle v. Rollins, 12, 31, 33, 69,	
Saltus v. Everett	215, 218, 421	71, 157, 226	
Sammons v. Newman, 719, 742,		Sawyer v. Huff	394, 564
766, 790, 792, 801		v. Merrill	247
Sampson v. Reynolds	343	Saxton v. Williams	87, 95, 530
Sams v. Armstrong	349	Sayers v. Holmes	455, 460, 620
Samson v. Rose	185, 211, 498	Sayward v. Warren	411
Samuel v. Agnew, 154, 163, 164,		Scattergood v. Wood	497
165		Seay v. Bacon	206
Sanborn v. Coleman	102	Schaffer v. Faldwesch	287, 401
v. Leavitt, 149, 695, 702		Scheer v. Schwabacher	719
v. Osgood	137	Schell v. Husenstine	429
v. Royce	111	Schemmelpennich v. Bayard ..	102
Sandeford v. Hess	404, 570	Schenck v. Long	110, 283
Sander v. Goldsmith	37	Schermerhorn v. Buell	182
Sanders v. Goodwin	687	v. Mitchell	405
v. Reed	184, 195	v. Van Volken-	
v. Young	110	burgh	71
Sanderson v. Lace	639, 683	Schlenker v. Risley	567
v. Marks	313	Schlieman v. Bowlin	747
Sandler v. Bresnahan	597	Schmidt v. Bender	230, 245
Sands v. Fritz	678, 808	v. Nunan	469
v. Phieffer	195, 198	Schnaider v. Niederweiser, 763,	
Sanford Mfg. Co. v. Wiggins, 12,		766	
52, 392, 404		Schofield v. Ferrers, 316, 504, 505,	
Sanger v. Kinkade	309	510, 637, 670	
Sapsford v. Fletcher	390	v. Whitelegge, 244, 289,	
Sargeant v. Courrier	19, 21	310, 311, 312	
Sargent v. Franklin	523	School Dist. v. Lord	56
v. Metcalf	122	v. Shoemaker, 395,	
v. Sturm, 131, 139, 218,		399, 416, 515, 527	
264, 267		Schoonmaker v. Kelly	129
Sarjeant v. Blunt	101, 102	Schrader v. Wolfin	96, 776
Sartin v. Weis	362, 657, 791	Schreoppel v. Corning	47
Saunders v. Jordan	49, 54, 140	Schroeder v. Clark	429
		Schulenberg v. Campbell	12

PAGES.	PAGES.
Schulenberg v. Harriman, 72, 198, 211, 212, 220, 223, 401, 565	Semmes v. Spregg..... 558
Schultz v. Hickman..... 519	Sensenbrenner v. Mathews..... 561
Schwabacher v. Kane..... 137	Sergeant v. Gile.....102, 107
Schwartz v. Skinner..... 113	Severence v. Melick.....461, 497
Scriven v. Moote..... 182	Sewell's Falls Bridge v. Fisk... 542
Scrugham v. Carter.....110, 116	Sexey v. Adkinson..... 140
Scott v. Elliott, 60, 468, 519, 732, 754	Sexton v. McDowd.....15, 325, 344
v. Fuller..... 388	Seymour v. Billings, 309, 393, 452, 658, 711
v. Hughes.....427, 440, 464	v. Van Curen.....35, 199
v. Rogers, 102, 513, 521, 522	Shackleford v. Smith..... 554
v. Scott.....752, 760	Shaddon v. Knott.....52, 57, 166
v. Tyler..... 776	Shahan v. Smith..... 650
Scudder v. Worster.....293, 435	Shappendocia v. Spencer..... 729
Seabury v. Ross..... 528	Sharon v. Nunan.....45, 264
Seals v. Edmondson..... 58	Sharp v. Parks..... 215
Seamon v. Luce, 152, 457, 534, 539, 540, 636	v. Whittenhall.....14, 150
Search v. Miller..... 594	Shaw v. Becket..... 175
Sears v. Wingate..... 421	v. Coster..... 343
Seaton v. Higgins..... 150	v. Havekluft..... 806
Seaver v. Dingley, 69, 131, 133, 242, 243	v. Hoffman..... 316
v. Lincoln.....247, 327, 588	v. Levy..... 698
Seavey v. Dearborn..... 212	v. Tobias, 740, 745, 792, 793
v. Potter..... 137	v. Webster..... 336
Seay v. Bacon..... 647	Shea v. Watkins..... 150
Seeman v. Allard..... 572	Shearick v. Huber....147, 149, 404
v. Feeny..... 507	Sheble v. Curdt.....63, 88
Seibel v. Siemon..... 341	Sheldon v. Van Buskirk..... 343
Seibert v. McHenry, 212, 225, 565	Shell v. Haywood..... 187
Seidenbach v. Riley..... 398	Shelton v. Berry.....282, 302
Seimmons v. Austin..... 51	Shenuit v. Brueggestradt..... 475
Seip v. Tilghman.....227, 265, 705	Shepard v. Butterfield..... 454
Selden v. Cashman, 506, 507, 510, 542	v. Cross..... 225
Seldner v. Smith.....18, 542, 784	v. Philbrick..... 182
Seldon v. Hickok..... 117	Shepherd v. Boyce..... 391
Seligman v. Kalkman..... 131	v. Johnson, 482, 512, 513
Sellar v. Clelland..... 526	v. Thompson..... 554
Sellers v. Kelly..... 550	Sheppard v. Melloy..... 72
Sellick v. Phelps..... 375	Sherborne v. King..... 688
Selway v. Fogg..... 136	Sherman v. Clark.....479, 512, 632
	Sherron v. Hall.....148, 225
	Sherry v. Foresman, 718, 788, 796, 808
	v. Picken..... 138
	Shewell v. McKinley..... 328

PAGES.	PAGES.
Shipman v. Clark, 337, 339, 343, 344, 695	Singer Mfg. Co. v. Doxsee, 604, 780 v. Benjamin.....402 v. Rhodes..... 369 v. Sammons... 620
Shoemaker v. Simpson, 191, 240, 243, 247, 249, 251, 253	Single v. Barnard.....602, 614 v. Schneider, 205, 471, 488, 494, 496, 505
Shomo v. Caldwell, 51, 55, 71, 285	Sirrine v. Briggs..... 478
Shorey v. Hussey 331	Skidmore v. Taylor.....45, 292
Shorlan v. Govett..... 348	Skilton v. Winslow.....233, 343
Short v. Barker..... 216	Skinner v. Chicago, &c.,..... 397 v. Stouse133, 256
Shotwell v. Wendover 523	Skipp v. Harwood..... 110
Shover v. White 110	Slack v. Brown..... 510 v. Heath 362
Shufeldt v. Pease..... 138	Slayter v. Williams.....247, 313
Shulenburg v. Harriman..... 560	Sleeper v. Osgood..... 164
Shumway v. Leakey..... 76 v. Rutter..... 252	Sloan v. Anderson..... 299
Shute v. McMahon 657	Slocum v. Mayberry..... 162
Shuter v. Page.....394, 406	Small v. Bixley..... 658 v. Hutchins..... 106
Siedenbach v. Riley 400	Smallwood v. Norton..... 804
Sildner v. Smith and wife..... 769	Smith v. Archer..... 249 v. Aurand.....389, 674 v. Bahr 618 v. Benson..... 186 v. Brennan..... 125 v. Colson..... 389 v. Coolbaugh632, 634 v. Crockett.....6, 42 v. Danie 125 v. Demarris..... 661 v. Dennis..... 131 v. Dillingham..... 773 v. Dodge.....289, 610, 642 v. Doty128, 129 v. Emmerson, 75, 293, 309, 384, 385, 645, 691 v. Fellon 803 v. Field 135 v. Fisher.....366, 687 v. Fyler..... 389 v. Goodwin 184 v. Graves, 51, 71, 216, 441, 549
Silloway v. Brown..... 114	
Silsbury v. McCoon, 202, 203, 343, 488	
Simcoke v. Frederick, 53, 303, 322, 388, 562	
Simmons v. Brown..... 507 v. Jenkins, 96, 211, 395, 446, 557, 558 v. Lettystone..... 249 v. Lyons251, 312	
Simonds v. Parker, 366, 367, 740, 741	
Simpson v. DeHaven..... 44 v. McFarland, 42, 82, 387, 394, 406, 565, 639, 640, 643, 644 v. Perry.....618, 631 v. St. John..... 159 v. Wrenn, 31, 70, 107, 249, 253, 255, 577, 586, 588	
Sims v. Boynton..... 417 v. Glazner..... 213 v. Mead..... 274 v. Reed.....151, 152	
Simser v. Cowan..... 312	
Sinclair v. Murphy..... 106	

	PAGES.		PAGES.
Smith v. Gouder.....	526	Smith v. Whitaker.....	806
v. Griffith.....	478, 523, 526	v. Whiting, 59, 333, 336,	
v. Hague.....	198	357, 358, 527, 718, 720,	
v. Houston, 16, 527, 528,		783, 794	
600, 602		v. Williamson, 18, 57, 223,	
v. Howard.....	368	243	
v. Huntington, 12, 42, 147,		v. Winston, 401, 404, 453,	
149		639	
v. Jensen.....	566, 586, 587	v. Wood.....	225, 601
v. Lisher.....	791, 797, 808	v. Woodleaf.....	273
v. Little.....	411	v. Young.....	260
v. Lyons.....	125, 166, 218	Sneathen v. Grubbs.....	141
v. Martin.....	554	Snedeker v. Quick, 290, 324, 325	
v. McCool.....	666	Snook v. Davis.....	399, 401, 418
v. McFall.....	352, 367, 368	Snow v. Como Street Ry.....	394
v. McGregor, 371, 381, 639,		v. Roy.....	328, 329
745		Snyder v. Norris.....	797
v. McLean, 93, 240, 242,		v. Vaux, 195, 198, 201, 202,	
246, 247, 248, 249, 251,		204, 206, 291, 493	
253, 291, 324, 384		Soloman v. Dawes.....	256
v. Meldren.....	600	v. Hathaway.....	127
v. Mitchell.....	568	Somis v. Brewer.....	139
v. Mohler.....	569	Soper v. Hawkins.....	685
v. Montgomery, 150, 305,		Sopris v. Lilley, 355, 454, 717, 763,	
306		783, 805	
v. Morgan.....	394	v. Truax.....	247, 399
v. Morrell.....	213	Soria v. Davidson.....	603
v. Mosby.....	797	South Plank v. Hixon.....	44
v. Orser.....	55	Southall v. Garney.....	295, 391
v. Phillips.....	89, 531, 613	Southern Warehouse v. John-	
v. Plomer.....	68, 106	son.....	606
v. Powers.....	554	Southwick v. Smith.....	42, 56
v. Pries.....	725, 804	Spalding v. Spalding.....	286
v. Rice.....	68, 114	Sparks v. Compton.....	97
v. Roby.....	471, 679, 767	v. Heritage.....	398, 400, 653
v. Sherman.....	510	v. Spicer.....	192
v. Sherwood.....	510	Speer v. Skinner.....	373, 377
v. Smith, 77, 132, 262, 601,		Spencer v. Bidwell.....	298
653		v. Blackman.....	250
v. Snyder, 393, 453, 455,		v. Dickerson.....	366, 367
653		v. McGowan, 11, 151, 343,	
v. Stanford, 35, 291, 294,		389	
295		v. Roberts.....	37, 52
v. Trawl.....	353	Spicer v. Waters.....	512
v. Welch.....	247	Spooner v. Ross.....	118

PAGES.	PAGES.
Spoor v. Holland..... 485	State <i>ex rel.</i> v. Dunn, 361, 367, 609, 636
Spores v. Boggs..... 418	State <i>ex rel.</i> Calvin v. Six..... 679
Sprague v. Birchard..... 337	State <i>ex rel.</i> , etc. v. Williams.. 341
v. Clark, 51, 52, 55, 57, 69, 284, 285	State for use, etc., v. Farrar.... 655
v. Kneiland..... 415	State to use, etc., v. Daily, 75, 769 v. Platt..... 660
Sprights v. Hawley..... 216, 250	Stearns v. Raymond..... 211
Spratley v. Kitchens, 328, 606, 697	Steele v. Farber..... 182
Spring v. Bourland..... 150, 695	v. Matterson..... 598, 651
Sproule v. Fords..... 512, 523	Steinwender v. Outley..... 137
Spur v. Skinner..... 362	Stephens v. Frazier..... 571, 649
Spurgeon v. Spurgeon..... 76	v. Halstead..... 403
Squires v. Smith..... 94, 148, 256	v. Scott..... 310, 603, 611
Stacy v. Farnham..... 279	Stephenson v. Hart..... 132
Staley Furnishing Co. v. Wal- lace..... 302	v. Little..... 212, 214
Stall v. Diamond..... 688	Stern v. Mason..... 418, 560
Stanbach v. Rexford..... 399	Sterner v. Hodgson..... 178
Stanchfield v. Palmer, 245, 247, 253, 291, 556	Stevens v. Chase..... 55
Standard Oil Co. v. Bretz..... 232	v. Cunningham..... 103
Stanfield v. Stiltz..... 578	v. Eno..... 64
Stanley v. Donohoe..... 477	v. McClure..... 506, 780
v. Gaylord, 51, 75, 102, 103, 216, 246, 248, 251	v. McMillin..... 634
v. Neale..... 59	v. Osman..... 290, 309
v. Robinson..... 46	v. Smith..... 511
Stansfield v. Hellawell..... 356	v. Tuite, 14, 16, 373, 381, 457, 467, 473, 477, 498, 511, 774, 776, 777
Stapleford v. White, 7, 34, 68, 247	v. Williams..... 557
Stark v. Stark..... 765	Stevenson v. Miller..... 356
Starky v. Kelly..... 522	v. Ridgley..... 42
Starr v. Hinshaw..... 309	v. Smith..... 316, 510
State v. Barrels..... 156	Stevison v. Earnest, 309, 717, 719, 729, 805
v. Boisliniere..... 334	Stewart v. Ball's Admrs..... 207
v. Booker..... 149	v. Drake..... 520
v. Doepke..... 45	v. Emerson..... 131
v. Jennings, 249, 331, 343, 344	v. Fitch..... 601
v. Kinkaid..... 472, 532	v. Mills..... 396
v. McCann..... 81	v. Taylor..... 605
v. Smith..... 340	v. Wells... 31, 34, 231, 337
v. Stevens..... 333, 336, 352	Stickney v. Allen..... 485
v. Welch..... 326, 346, 359	v. Smith..... 284, 297, 410
v. Wilson..... 323, 332	Stillman v. Squire, 247, 306, 331, 587

	PAGES.		PAGES.
Stiles v. Griffith, 156, 168, 172, 173		Stringer v. Davis.....	403
Stimpson v. Reynolds, 339, 344,	695	Strohm v. Hayes.....	572
Stinson v. Farnham.....	334	Strong v. Bank.....	243
St. John v. O'Connell.....	256	v. Keene.....	527
St. Louis v. Rudolph.....	92	v. Lawlor.....	28
St. Louis & Alton R. R. v. Cas-		v. Whitehead.....	499
tello.....	205, 292	Struman v. Robb.....	802
St. Martin v. Desnoyer.....	14, 280	Strutt v. Smith.....	136
Stockwell v. Byrne.....	689, 783	Sturges v. Keith.....	514
v. Kemp.....	761	Styles v. Griffith.....	174
v. Phelps.....	35, 195	Sudbury v. Stearns.....	48, 223
v. Veitch, 31, 168, 172,	173	Suggett v. Cason.....	66
Stoddard v. Gilman.....	171, 444	Sullivan v. Stephenson.....	155
Stoker v. Craue.....	284	Summer v. Waugh.....	132
v. Yerby.....	54	Summers v. Jarvis.....	658
Stokes v. Stevens.....	113	v. Parker.....	657
Stolberg v. Ohnmacht.....	282	Summons v. Austin.....	71, 75
Stoltz v. The People.....	602	Sumner v. Cook.....	552, 626, 632
Stone v. Bird.....	150, 252, 553, 618	v. Woods.....	417
v. Hopkins.....	281, 353	Sunberg v. Babcock.....	656
v. O'Brien.....	265, 554	Supervisors, &c., v. Manny, 175	
v. Quall.....	294	Surles v. Sweeney.....	251
v. Wilson.....	33	Susquehanna v. Finney.....	293, 577
Storey v. Roberts.....	342	Suteliffe v. Dohrman, 485, 534,	541, 800
Storm v. Livingston, 257, 259, 260,	264	Sutherland v. Carter.....	21, 294
Storms v. Eaton.....	696	Sutro v. Hoile.....	124, 135, 416
Story v. O'Dea.....	730, 773	Suydam v. Jenkins, 440, 458, 459,	464, 467, 471, 477,
Stousbury v. Arkwright.....	554	484, 488, 508, 513,	523, 525
Stout v. LaFollette.....	374, 375	Swain v. Alcorn.....	140
Stow v. Yarwood.....	420	v. Roys.....	528
Stowell v. Lincoln.....	527	Swann v. Shewell.....	319, 323, 333
v. Otis.....	440	Swantz v. Pillow.....	674, 726
Strang v. Whitehead.....	510	Swartz v. Skinner.....	117
Strasburger v. Barber.....	507	Swearinger v. Magruder.....	391
Stratton v. Allen.....	247, 253	Sweeney v. Lomme, 609, 633, 724,	779, 785, 793, 806
Strauss v. Crawford.....	117	Sweet v. Tuttle.....	664
Street v. McClerken.....	555	Sweetzer v. Mead.....	651
v. Nelson.....	198, 199, 202	Swett v. Boyce.....	229
Streeter v. Streeter, 28, 390, 420,	421	Swift v. Barnes, 515, 522, 525, 558	
Strickland v. Parker.....	63	v. Crocker.....	327
String v. Bourland.....	147	Swindell v. Warden.....	554

	PAGES.
Syford v. Shriver	177
Sylte v. Nelson	422, 446

T.

Taggart v. Hart	34
Talbot v. De Forest	91, 165, 166
Talcott v. Anderson	391
v. Belding	240
v. Crippen	450, 478
v. Henderson	133
Tallman v. Tweek	251
Talmage v. Scudder	253, 264
Talvandi v. Crepps	235, 406
Tancil v. Seaton	82
Tancre v. Pullman	283
v. Reynolds	253, 283
Tandle v. Crane	289
Tandler v. Saunders	73, 480
Tannahill v. Tuttle	91
Tarbell v. Gray	742
Tardy v. Howard	611, 621
Tarpey v. Shillenberger	761
Tarpy v. Shepherd	527
Tate v. O. & M. R. R.	749
Tatum v. Sharpless	80
Taylor v. Duesterberg	553
v. Hathaway	597, 598
v. Jenkins	441
v. Ketchum	527
v. Moore	389, 390
v. Morgan	503
v. Morton	500
v. Richardson	130
v. Riddle	291, 293, 557
v. Seymour	252
v. Strickland	733
v. Taylor	76
v. True	42
v. Welby	11, 178
v. Wells	290, 324, 673
Teall v. Van Wyck	737
Teeple v. Dickey	232
Tell v. Beyer	312, 710
Temple v. Alexander	237

	PAGES.
Terry v. Allis	482
Terryll v. Bailey	409, 663, 710
Teschner v. Deveron	378
Tessier v. Crowley	299
v. Englehart	297
Thatcher v. Franklin	144
v. Harlan	274
Thayer v. Turner	136, 137, 144
The City Bank v. R. W. & O. R. R.	59
The City of Fort Dodge v. Moore	293
The D. & F. Missionary Soc. v. Hinman	376
The People v. Wiltshire	332
The People, Use, &c., v. Core, 332, 362	
Therber v. Richmond	639
Thbmas v. Crofut	184
v. Freligh	133
v. Irwin	716, 749, 759
v. Spofford, 363, 515, 558, 783	
v. Wilson	753, 754
v. Winters	127
v. Wiseman	423
Thomas of Motyshale v. Ab- bott of Cirencester	319
Thompson v. Blanchard	133
v. Bronson	409
v. Butler	154, 165
v. Button, 71, 106, 172, 596, 599, 601	
v. Eagleton	625
v. Jones	140
v. Lacy	79
v. Merohenney	553
v. Musser	599
v. Pearce	295
v. Peck	9, 127
v. Raymon	657
v. Rose	133, 578
v. Scheid, 399, 481, 634	
v. Shirley	260
v. Sweetser	400

	PAGES.		PAGES.
Thompson v. Trail.....	274	Tracy v. Veeder.....	800
v. Wedge.....	127	v. Warren.....	72, 668
v. Wells.....	688	Trapnall v. Hattier, 30, 32, 132,	267
Thornburg v. Hand.....	567, 574	Trask v. Magaire.....	168
Thorne v. Colton.....	212	Travers v. Inslee.....	14, 168, 173
Thorp v. Burling.....	250	Treadwell v. Brown.....	110
Thurber v. Richmond.....	356, 687	Treat v. Hathorn.....	260
Thurston v. Blanchard, 128, 129,	130, 131, 132, 133,	v. Staples.....	157, 529
136, 247		Treman v. Morris, 358, 479, 482,	738
Tibbal v. Cahoon.....	14, 765, 784	Trevilian v. Pyne.....	387
Tibbles v. O'Connor.....	765	Trieber v. Knabe.....	27
Tice v. Norton.....	389, 390	Trimble v. State.....	801
Tiedman v. O'Brien.....	461, 800	Tripp v. Howe, 353, 367, 384, 385	
Tift v. Tift.....	223	v. Leland.....	233
Tift v. Verden.....	14, 657	v. Riley, 119, 209, 210, 214	
Timp v. Dockham, 69, 416, 455,	635, 638, 689	Tronson v. Union Lumber Co. 312	
Tison v. Bowden.....	55, 150	Trotter v. Taylor.....	393
Titcomb v. Wood, 131, 132, 216,	219	Trottie v. Myly.....	22, 136
Titsworth v. Frauenthal, 485, 583		Trowbridge v. Bosworth....	77, 698
Tittmore v. Labunty.....	55	v. Sickler.....	571
Titus v. Berry.....	742	Troy, &c., R. Co. v. Kane, 168, 169	
Todd v. Gordy.....	765	Trudo v. Anderson, 244, 247, 251,	261, 267, 270
Toft v. Chapman.....	243	True v. Plumby.....	618
Toland v. Swearingen.....	755	Trueblood v. Knox.....	790, 792
Toles v. Adee.....	749	Truelock v. Rigsby.....	29, 388
v. Cole.....	772	Truitt v. Revell.....	4, 461, 571
Tome v. Dubois.....	226	Truttell v. Harrill.....	697
Tomlin v. Fisher.....	14	Tuck v. Moses, 348, 353, 356, 365,	367, 494, 515, 519, 558,
Tomlinson v. Collins.....	55, 562	640, 674, 740, 799	
Tompkins v. Batie.....	678	Tucker v. Edwards.....	225
Tomplin v. Addy.....	217	v. Parks.....	436, 510
Torian v. McClure.....	138	Tuckwood v. Hanthorne.....	633
Torrey v. Burnett.....	187, 188	Tuley v. Manzey.....	652
Tousey v. Bishop.....	766, 768	Tullis v. Orthwein.....	153
Town v. Evans.....	14, 564	Tully v. Fairly.....	122
v. Tabor.....	439, 549	v. Harloe.....	525, 559
v. Wilson.....	386, 561	Tummons v. Ogle.....	718
Towne v. Sparks.....	35, 400	Tunple v. Alexander.....	364
Town of LeRoy v. McConnel... 601		Turberville v. Self.....	577
Townsend v. Bargo.....	540, 541	Turner v. Belden.....	554
v. Brooks.....	606	v. Bondaleer.....	305
Tracy v. New York, &c.....	35, 462		

	PAGES.		PAGES.
Turner v. Brock.....	668, 703	Valle v. Cerre.....	233
v. Cool.....	564	Van Alstine v. Kittle.....	460
v. Langdon.....	575	Van Baalen v. Dean, 56, 74, 418,	566
v. Lilly.....	14	Van Buskirk v. Purington.....	80
v. Reese, 378, 430, 583, 696		Van Cleef v. Fleet.....	131, 142
v. Retter.....	421, 482	Vanderburgh v. Bassert.....	336
Turpie v. Fagg.....	582, 583	v. Van Valken-	
Turrill v. Crowley.....	79	burgh, 284, 297,	
Tuttle v. Cook.....	331	311, 314	
v. Robinson, 233, 244, 252,		Vanderford v. Foster.....	605
589		Vanderhorst v. Bacon.....	265
Twelless v. Coldville.....	334	Van Der Minden v. Elsas.....	310
Twinam v. Swart, 153, 264, 266,		Vanderslice v. Newton.....	510
467, 470, 479, 480		Vandine v. Burpee.....	805
Tyler v. Bowlus.....	790	Van Dwyne v. Coope.....	766
v. Davis.....	764	Vaneter v. Crossman.....	154
v. Freeman.....	60, 69	Van Gorder v. Smith.....	229, 665
Tyner v. Hays.....	400, 628	Van Horn v. Overman.....	407, 656
Tyson v. Bowden.....	696	Van Husen v. Knouse.....	273
Tyus v. Rust.....	79	Van Namee v. Bradley, 54, 56, 71,	
		392, 404, 409, 645	
		Van Pelt v. McGraw.....	184
		Van Valkenburgh v. Thayer...	249
		Van Winkle v. Udall.....	331
		Vaughan v. O'Brien.....	663
		Vaughen v. Owens.....	567
		Vaughn v. Norris.....	722
		Vausse v. Russell, 44, 186, 193,	
		195	
		Veazie v. Somerby.....	575
		Vennum v. Thompson.....	296, 556
		Ventres v. Smith.....	220
		Verner v. Bosworth.....	140
		Verry v. Small.....	399
		Vickery v. Sherburne.....	392, 393
		Viel v. Hoag.....	758
		Vinal v. Spofford.....	658, 711
		Vinson v. Ardis.....	59
		Vinton v. Mansfield.....	235, 798
		Vinyard v. Barnes, 705, 716, 726,	
		759	
		V. M. R. R. Co. v. Ragsdale....	316
		Vocht v. Reed.....	168, 172
		Voge v. Breed.....	662
U.			
Ullmann v. Kline.....	748		
Underwood v. Tatham.....	257		
v. White, 549, 596,			
602, 609, 636, 645,			
652, 653			
Union Lumber Co. v. Trousou, 78,			
344, 695			
Urdike v. Henry.....	64, 141		
Upton v. Rasford.....	553		
U. S. v. Brown.....	355		
v. Cook.....	72, 204, 212		
v. Dantzler.....	376		
v. Kennan.....	42		
U. S. Express Co. v. Keefer.....	295		
Usry v. Rainwater.....	112, 119		
V.			
Vaiden v. Bell, 6, 12, 30, 314, 365,			
415			
Vail v. Lewis.....	337		
Valentine v. Jackson.....	389		

	PAGES.		PAGES.
Vogal v. Badcock, 296, 297, 305,	311	Walpole v. Smith, 52, 57, 60, 83,	247, 394, 396, 643
Vollum v. Simpson.....	453	Walsh v. Adams.....	110
Voorhees v. Earl.....	128, 129	Waltman v. Alison.....	388, 561
Voorhis v. Freeman	189	Wambold v. Vick.....	552, 567
Vosburgh v. Welch.....	467	Wanborg v. Karst.....	665
Vose v. Hart, 391, 392, 393, 409,	647	Wangler v. Franklin.....	420, 624
v. Stickney.....	252	Waples v. McIlvain.....	722
Vrooman v. King.....	554	Ward v. Anderberger.....	446
W.		v. Eyre.....	213
Wachstetter v. State	765	v. Henley.....	785
Waddell v. Broadway, 719, 790,	792	v. Henry.....	163
v. Magee.....	589	v. Macauley.....	12
Wade v. Mason	55, 68, 105	v. Masterson, 602, 632, 642	
Wadley v. Harris	300	v. Taylor.....	149
Wagar v. Briscoe.....	188	v. Worthington.....	114, 211
Wagner v. C. & T. R. R. Co.....	191	Warder v. Hoover.....	243
Waid v. Gailord.....	31	Wardrobe v. California Stage	
v. Gaylord	231	Co.....	507
Wainscott v. Smith.....	58	Ware v. Brookhouse.....	554
Wait v. Triplecock.....	14, 665	v. Percival	175
Wakeman v. Barrows	143, 157	Ware River R. R. Co. v. Vibard, 642	
v. Lindsay.....	630	Warner v. Aughenbough, 291, 295,	
Walbridge v. Shaw.....	639, 693	296, 385, 462, 463	
Walcot v. Pomeroy.....	52	v. Caulk.....	420, 421
Walcott v. Harris.....	786	v. Comings.....	498, 774
Waldman v. Broder, 110, 645, 652	682	v. Comstock.....	664
Waldron v. Leach	324	v. Cushman.....	21, 214
Walker v. Fenner.....	112, 115	v. Hunt, 56, 541, 613, 649	
v. Hampton.....	346	v. Matthews, 53, 87, 409,	
v. Hunter.....	618, 641	457, 782, 791	
v. Spring.....	115, 392	v. Sauk Co. Bank, 292, 526	
Wall v. Humphrey	730	Warren v. Cole.....	487, 499
Wallace v. Brown.....	40, 53, 54	v. Forney	25
v. Clark.....	791, 796, 808	v. Leland, 52, 82, 194, 224	
v. Hilliard, 598, 599, 601,	604, 632	Warring v. Warren.....	554
Wallen v. Rossman	568	Washburn v. Cutter.....	194
Wallingsford v. Bennett.....	165	v. Huntington	601
Walls v. Johnson, 457, 748, 749,	777	v. Mendenhall.....	644
		Washington v. Love, 114, 211, 230,	
		439	
		Washington Ice Co. v. Webster, 453,	
		473, 496, 499,	
		511, 515, 528,	

PAGES.	PAGES.
541, 558, 675, 772, 776	Weeks v. Robie..... 197
Waterbury v. Westervelt..... 538	Weidel v. Roseberry..... 389
Waterhouse v. Smith..... 38	Weidman v. Kohr..... 554
Waterman v. Matteson, 37, 183, 184, 651	Weil v. Ryns..... 98, 648
v. Robinson, 12, 52, 68, 82	v. Silvestone..... 212
v. Todd..... 577	Weinberg v. Conover..... 339, 349
Waters v. Reuber..... 187, 199, 302	Weiner v. Van Ransselaer, 338, 702
Watkins v. Baird..... 217	Weir v. Allen..... 156
v. Page, 147, 287, 339, 343, 695, 697, 702	Weizen v. McKinney..... 641
v. White..... 216	Welborn v. Shirly..... 135
Watrous v. Cunningham..... 552	Welch v. Durand..... 499
Watson v. Bissell..... 554	v. Sackett..... 93, 596
v. Jackson..... 430	v. Smith..... 291, 628
v. Todd..... 147	Welker v. Wolverkuehler, 132, 135, 138
v. Watson, 6, 12, 33, 323, 326, 338, 343	Weller v. Ely..... 221
Watt v. Potter..... 256, 523	Welles v. Thornton..... 106
Watt's Exrs. v. Sheppard..... 733	Wellman v. English..... 264
Watts v. Green..... 604	Wells v. Abraham..... 216
Waverly v. Darby..... 457	v. Bannister..... 186
Way v. Barnard..... 675, 700, 716	v. Griffin..... 756
Weathersby v. Sleeper..... 192	v. Hornish..... 389
Weaver v. Field..... 765, 804	v. Johnson..... 652
v. Lawrence, 14, 33, 321, 370	v. Lamb..... 143
Webb v. Fox..... 158, 284	v. Noyes..... 63, 115
v. Pound..... 737	Welsh v. Cochran..... 31
Webber v. Davis..... 226	Welton v. Beltezore..... 532, 615
v. Merrill..... 618	Weemple v. Stewart..... 526
v. Read..... 435	Wendell v. Abbott..... 554
v. Shearman..... 387	West v. St. John..... 571
v. Underhill..... 425	v. Wentworth..... 513, 522
Weber v. Henry..... 163	Westcott v. Bock..... 682, 700, 701
v. Manne..... 356	Westenberger v. Wheaton, 148, 287, 401
Webster v. Price..... 370, 745	Western Pub. Co. v. Botti- neau..... 323
v. Van Deventer..... 118	Western R. R. Co. v. Bayne..... 306
Wedell v. Abbott..... 554	Western &c. v. Walker..... 610
Weed v. Hall..... 140	Westervelt v. Bell..... 366
v. Hinton..... 366	West Mch. Sav. Bank v. How- ard..... 427, 651
v. Page..... 128, 129, 132	Wetherbee v. Colby..... 732
Weeks v. Peach..... 388	v. Green, 202, 205, 206, 488
	Wetson v. Fuller..... 8

	PAGES.		PAGES.
Weymouth v. C. R. R.....	205, 494	White S. M. Co. v. McBride.....	137
Whaling v. Sholes.....	368	White & Son v. Woodruff, 552, 584,	629, 655
Wheaton v. Sugg.....	387	Whitfield v. Whitfield, 16, 484, 512,	544, 554, 607
Wheat v. Catterlin, 602, 603, 719,	721	Whitman v. Merrill.....	662
Wheaton v. Thompson.....	535, 779	v. Tittle.....	251
Wheeler v. Allen.....	37, 48, 392	Whitney v. Burnette.....	83
v. Billings.....	565	v. Butterfield.....	331
v. Dixon.....	74	v. Carle.....	444
v. McCorristen.....	54, 404	v. Jenkinson, 339, 352,	357, 367
v. McFarland, 36, 59, 71,	78	v. Ladd.....	110
v. Train, 14, 47, 106, 643,	653, 674	v. Lehmar, 453, 725, 756,	780, 808
v. Wilkins...362, 635, 685		v. McConnell, 244, 248,	268
Wheeler & Wilson Mfg. Co. v.		v. Slonson.....	257
Teetzlauff.....	57, 259, 266, 560	Whittemore v. Jones.....	362, 735
Wheelock v. Cozzens.....	6, 12	Whittington v. Deering....	390, 404
Whetmore v. Rupe.....	636	Whitwell v. Wells, 52, 257, 394,	406, 455, 638, 639,
Whipple v. Thayer.....	62, 154, 249	643, 644, 674, 675	
Whitaker v. Wheeler.....	153	Whitworth v. Thomas.....	420
Whitcomb v. Hoffman.....	461	Wickliffe v. Sanders.....	12
v. Hungerford.....	64	Wiggin v. Day.....	139, 572
White v. Bascom.....	69	Wilber v. Flood, 128, 137, 279,	280, 282
v. Brooks.....	214	Wilbraham v. Snow.....	79, 481
v. Brown.....	248, 259	Wilbur v. Gilmore.....	693
v. Cross.....	577	Wilcoxon v. Annesley.....	601
v. Demory.....	259	Wild v. Holt....	204, 206, 487, 526
v. Dolliver.....	168, 380, 701	Wilde v. Clarkson.....	785
v. Gainer.....	274	v. Paschen.....	236
v. Graves.....	633	Wilderman v. Sandusky.....	618
v. Jones.....	110, 155, 602	Wiler v. Manley.....	427
v. Lloyd.....	406	Wiley v. Aultman.....	299
v. Moseley.....	543	Wilhite v. Williams.....	288, 314
v. Phelps.....	91	Wilkerson v. McDougall, 424, 466,	645
v. Ross.....	465	Wilkins v. Dingley.....	334
v. Spettigue.....	215, 216	v. Treynor, 641, 644, 682,	683
v. Storms.....	207, 519	Wilkinson v. Kettle.....	99
v. Van Houten, 453, 667,	778	v. Stewart.....	210
v. Webb, 481, 523, 533, 540			
v. White.....	77, 604		
Whiteford v. Burckmeyer.....	554		
v. Goodwin.....	366		
Whitesides v. Collier.....	639		

PAGES.	PAGES.
Willard v. Bridge..... 522	Willis v. O'Brien..... 94
v. Kimball, 170, 338, 339,	v. Reinhardt..... 566, 582
345, 695, 702	Wills v. Barrister..... 30, 122
v. Rice..... 212, 493	v. Noyes..... 114
Williams v. Archer..... 458, 522	Willson v. McQueen, 148, 152, 166
v. Babbitt..... 347	Wilson v. Barker..... 10, 256
v. Beede, 452, 529, 619,	v. Barnes..... 607
711	v. Conine..... 523
v. Bresnahan..... 531, 559	v. Fuller, 227, 283, 288,
v. Bunker..... 339	289, 444, 445, 560, 561
v. Chapman..... 633	v. Gray, 113, 115, 227,
v. Devine..... 651	290, 386, 673
v. Eikenberry, 406, 566,	v. Hillhouse..... 572, 776
567, 678, 707	v. Macklin..... 280, 287, 293
v. Gardner..... 281	v. Martin..... 428
v. Given, 132, 134, 137,	v. Mathews..... 508, 522
218	v. Means..... 600
v. Hall..... 657	v. Nason..... 102, 209
v. Howard..... 781	v. Reed..... 114
v. Ives..... 499, 510	v. Reese..... 576
v. Kessler..... 413	v. Royston, 53, 60, 74, 285,
v. Mathews..... 445	297, 393
v. Merle..... 218, 220, 250	v. Rybolt..... 44, 48
v. Morgan..... 35, 38, 427	v. Stillwell..... 736
v. Mostyn..... 335, 527	v. Stripe..... 152
v. Phelps, 467, 473, 477,	v. Wheeler..... 684
509	v. Williams..... 313, 366
v. Porter..... 610	v. Young..... 506
v. Smith, 19, 20, 21, 46,	Wincher v. Shrewsbury..... 198
389, 562	Winchester v. Craig..... 486, 487
v. St. Louis..... 748, 798	Windsor v. Boyce..... 240, 245, 247
v. Vail, 634, 758, 788,	Wing v. Bishop..... 262
789, 803, 804	Wingate v. Smith, 202, 203, 212,
v. Vick..... 567	213, 493
v. Welch..... 300, 394	Winnard v. Foster..... 148, 452
v. West, 55, 70, 74, 104,	Winser v. Orcutt..... 733
284, 287, 314, 371,	Winslow v. Leonard..... 577
451, 541, 639	v. Merchants' Insur-
v. Wilcox... 386, 445, 608	ance Co..... 292
Williamson v. Bryan..... 688	v. Urquhart, 78, 695, 706
v. Gottschalk..... 99	Wintrode v. Fluke..... 553
v. N. J. S. R. R. Co., 130	Wisconsin Ma. F. Co. v. Hobbs 386
v. Ringgold..... 4, 564	Wise v. Withers..... 337, 338
Willis v. Farley..... 553	Wiseman v. Lynn, 683, 718, 719,
v. Lyman..... 299	790, 801

	PAGES.		PAGES.
Wiseman v. Wiseman.....	553	Woodruff v. Cook.....	413
Wiswall v. Lampson.....	157	v. King.....	91, 613, 614
Witcher v. Watkins.....	458	Woods v. Kessler.....	797
Witfield v. Whitfield.....	503	v. Nixon.....	59
Witham v. Witham, 63, 485, 635,	675	Woodward v. Grand Trunk....	271
Wittick v. Traun.....	602	v. Ham.....	260
Woehler v. Endter.....	183	v. Woodward.....	241
Woglam v. Cowperthwait, 24, 26,	27, 321, 373, 381	Woodworth v. Knowlton.....	243
Wolcott v. Mead, 333, 357, 363,	792	Woolridge v. Quinn, 625, 633, 728,	736
Wolf v. Dorr.....	292	Woolston v. Smead.....	71
v. Meyer.....	603	Wooster v. Lyons.....	733
v. Scofield.....	312	Workman v. Warder.....	422
v. Stix.....	768	Worth v. Moore.....	62
Wolfe v. Blue.....	624	Wortham v. Gurley.....	55, 225, 497
v. McClure.....	763, 765	Wright v. Armstrong.....	32, 69
Wolfley v. Rising.....	532	v. Bennett, 214, 227, 408,	432
Wolford v. Powers.....	738	v. Briggs.....	169, 174
Wolgomot v. Bruner.....	390, 577	v. Funck.....	619
Wolpole v. Smith.....	645	v. Guier.....	193, 200, 202
Wolrath v. Campbell.....	531	v. Hoke.....	758
Wood v. Braynard, 467, 469, 513,	515, 578	v. Marvin.....	347, 755
v. Cohen, 138, 245, 247, 253		v. Matthews, 389, 452, 619,	640
v. Coman, 718, 736, 749, 783		v. Quirk.....	559, 724, 805
v. Dudley.....	91	v. Richmond.....	66
v. Fales.....	210	v. Williams, 388, 389, 391,	451, 453
v. Hyatt.....	151	Wyatt v. Freeman.....	428, 691
v. Jackson.....	666	Wyllie v. Wilkes.....	772
v. McDonald.....	255, 430	Wyman v. Bowman.....	660, 664
v. Morewood.....	486	v. Dorr.....	106
v. Orser, 63, 70, 79, 147,	612, 621	v. Gould.....	439
v. Page.....	137	v. Robinson.....	786
Woodburn v. Chamberlain, 600,	601, 631, 652	Wynkoop v. Wynkoop.....	45
v. Cogdal, 506, 512,	519		
Woodbury v. Tuttle.....	709		
Woodcroft v. Kynaston.....	387		
Wooden-ware Co. v. U. S.....	202		
Woodruff v. Adams.....	245		
v. Apgar.....	59		

Y.

Yale v. Seely.....	186
Yallop DeGroot Co. v. M. & St.	
L. R.....	466
Yandle v. Crane.....	412, 561
v. Kingsbury.....	479
Yantes v. Burditt.....	472

	PAGES.
Yarborough v. Harper.....	166, 441
Yarbrough v. Arnold.....	553
Yater v. Mullen.....	189, 513
Yates v. Fassett.....	13, 15, 388, 440
v. Joice.....	184
v. Russell.....	692
v. Smith.....	183, 251
v. Yates.....	697
Yelton v. Slinkard.....	780
Yorke v. Grenaugh.....	80
Yott v. The People.....	346, 379
Youl v. Harbottle.....	249
Young v. Atwood.....	348, 501, 626
v. Glasscock, 418, 560, 565	
v. Herdic.....	199

	PAGES.
Young v. Kimball.....	34, 77
v. Lego.....	600, 635
v. Lloyd.....	486
v. Miles.....	209, 214
v. Parsons.....	604
v. Pickens.....	424, 781
v. Spencer.....	527
v. Willett, 316, 457, 496,	497
v. Wise.....	341

Z.

Zachrissan v. Ahman.....	244, 261
Zachary v. Pace.....	256
Zitske v. Goldberg....	497, 498, 635

INDEX.

REFERENCES ARE TO SECTIONS.

	A.	SECTION.
ABATEMENT,		
when proper as a defense		814
plea in must contain what.....		813
plea in good. <i>See</i> ANSWER.....		770
ABANDONED,		
wife may bring the action.....		155
property		164-5
ABORTIVE SALE, effect of.....		107
ACT OF GOD, destruction by, as a defense.....		830
ACTS equivalent to demand.....		485
ACTION,		
for value cannot be brought while replevin pending.....		710
joinder of another with replevin is a misjoinder.....		585
of replevin must be by real party in interest.....		425
on bond. <i>See</i> BOND, ACTION ON		1269-81
ACTUAL DAMAGES only recoverable on full proof.....		950
ADMINISTRATOR,		
may bring the action.....		151, 424
liability in replevin		1151
ADJUDICATION, former, as a defense, good.....		810-11
ADVERSE POSSESSION, its relation to replevin		374-8
AFFIDAVIT		525-603
its history and what it is.....		525
its importance		526
jurisdiction depends upon.....		529
always necessary to delivery of property.....		527
no particular form necessary.....		582
statutory form but a general guide.....		581
proper form of		584
requisites of		583
must allege ownership or right of possession.....		533

AFFIDAVIT—*Continued.*

SECTION.

must allege—	
that property not taken for tax, etc.....	534
right of possession.....	532
property not taken on execution or attachment...	535
that property not taken in replevin.....	538
wrongful detention.....	542
must be definite as to person entitled to possession.....	558
allegations in the alternative not fatal.....	557
should state value of the property.....	539-41
must be signed and sworn to.....	530
allegations of should be in present tense.....	531
how venue stated in.....	564
defective cause of action and defective statement of a good cause.....	563
what is a sufficient.....	553-4
when sufficiency of is a question of law and when of fact...	554
how made when corporation plaintiff.....	562
may be made by an agent.....	560
proper form by an agent.....	561
fatal defects in, what are.....	568
variance in, fatal.....	545
the ground stated in for is binding on plaintiff.....	559
statutory allegations in, not conclusive of the facts.....	567
description—	
in, more particular than in trespass or trover.....	544
may be amended, when.....	548
one that can be made definite is good.....	547
best possible sufficient.....	549
where many small articles, a general good.....	552
by kind and quantity, when good.....	550
fractional part as a.....	551
undivided interest how described.....	551
copies of written instruments need not be set out in.....	546
defects in must be objected to before verdict.....	729
dismissal for defects in.....	1205
objections to should be made by motion.....	730
what defects in waived by pleading.....	553
amendment—	
<i>nunc pro tunc</i> as to name and <i>jurat</i> , when.....	572
new articles may be added by, when.....	577
damages may be enlarged by.....	570
jurisdictional defects in, not cured by.....	578
total lack of, cannot be cured by.....	580
new parties cannot be added by.....	579
new cause of action cannot be added by.....	575

AFFIDAVIT—Continued.

Amendment—Continued.

part of the property cannot be stricken out by,	
when.....	576
effect of failure to amend.....	574
should be amended by a new one.....	571
amended may be sworn to by different agent.....	573
when value stated in governs	541
value stated in not binding on trial.....	540
when proper evidence of value.....	996
when not a part of the pleadings.....	599
takes place of all other pleadings, when.....	587
nature of plaintiff's interest need not be particularly de-	
scribed	555
special interest must be pleaded.....	556
declaration by two should show interest of each	558
for exempt property must allege special facts.....	536-7
in replevin of attached property by attaching officer	592
need not be separate from the complaint.....	586
another form of action should not be joined with replevin,	585
defendant alone can take advantage of failure to file.....	528
"he detains" and he "detained," distinction between.....	543

See COMPLAINT, DECLARATION, PETITION.

AGENT,

<i>see</i> Bailor and Bailee	207-18
may bring, when.....	108
may replevy in his own name	133-41
may make affidavit in replevin.....	560
agency, how stated in affidavit.....	561
a different one may make amended affidavit.....	573
where transfers property wrongfully, replevin lies without	
demand.....	511-12
sale by, without authority ground of, when.....	208-9

ALIAS WRIT	606
when issued.....	629

See WRIT OF REPLEVIN.

ALIQOT PARTS,

articles separable into, repleviable.....	400
part of an, is not repleviable.....	402

ALLEGATIONS in replevin	567
--------------------------------------	-----

See AFFIDAVIT.

AMENDMENT,

<i>see</i> AFFIDAVIT.....	569-80
effect of failure to amend	574
misnomer in writ cured by.....	628
of writ as to value proper.....	627

	SECTION.
AMENDMENT—Continued.	
of description in writ, when proper	619-20
of bond, when allowed	697-8
ANIMALS IMPOUNDED	348-52
<i>See</i> DISTRAINT.	
ANSWER	726-82
a waiver of certain defects	553
waives what defects	726-7
what is a proper, under the codes	746
need not anticipate title not pleaded	778
contradictory defenses not proper	776
conjunctive and literal denials raise no issue	775
must be—	
certain to a common intent	748
full and explicit	747
should not state the evidence, but facts	749
should claim a return, but not fatal if it do not	782
illustration of—	
sufficient	771
defective in substance	774
when a general denial, no reply needed	839
what is a good general denial	750
what may be shown under general denial	751-6
all defenses must refer to time suit commenced	764
how far controlled by the court	766
several separate defenses may be pleaded	763
each defendant may plead separate defenses	765
plea in bar is a good	769
plea in abatement proper	770
not guilty proper plea, where	745
plea of property in a third person good	768
effect of plea of property in defendant	767
justification, proper averments of	757-60
burden of proof	758
should allege amount, levy, and validity of writ ..	759
of fraud should be specially pleaded	781
proper by officer in case of fraud	762
special property interest must be pleaded	779
in replevin by a mortgagee	772
usury should be specially pleaded	780
death of property must be specially pleaded	778
avowry as	734-5, 737
avowry little used in this country	737
<i>non cepit</i> and <i>non detinet</i> as	738-44
in nature of setoff, when proper	736
setoff or recoupment not a good	791

ANSWER—*Continued.*

matter of inducement not traversable.....	761
plea of payment or over-payment not good.....	773
to suit on bond must be complete.....	1372-3
to suit on bond held not good, when.....	1374

See PLEADINGS, DEFENSES.

APPEAL1236-49

after, cannot dismiss for defects.....	1202
must be taken by real party in interest.....	1237
value for the purpose of.....	1246
bond in, not liable for failure to return.....	1393
when return awarded on.....	1248
where the result is a nonsuit return should be awarded....	1203
waives certain defects.....	1244
judgment held in abeyance by.....	1247
defense cannot be changed on.....	1245
does not open judgment in appellant's favor.....	1249

See ERROR.

APPEARANCE waives defects..... 726-7

APPRAISAL in replevin, object of..... 675

APPRAISEMENT,

how far evidence of value.....	997
sheriff liable for an under.....	687-8

ARBITRATION, unqualified, a dismissal of replevin action..... 1214

ARCHIVES of a public office cannot be replevied..... 75

ARREST, when not proper under writ of replevin..... 631

ARTIFICIAL WORDS not to govern in declaration..... 597

ASSESSMENT,

property taken for, cannot be replevied.....	52
--	----

See TAX.

ASSIGNEE,

of landlord may replevy share of crop.....	34
of a property right may bring replevin	428
must give notice and demand.....	461

ASSIGNEE FOR BENEFIT OF CREDITORS,

rights of, in replevin.....	290-8
is not a purchaser for value.....	290
represents the assignor.....	291
in bankruptcy represents the creditors	291
need not allege his official character.....	292
rights of, depend upon compliance with the statute	293
does not take title to growing crop on homestead	294
suit by, subject to the same defenses as any other plaintiff	298
may replevy property taken by the assignor.....	295

ASSIGNMENT,

effect on contract of sale.....	282
---------------------------------	-----

	SECTION.
ASSIGNMENT—Continued.	
assignee of note can replevy the mortgaged property.....	186
of judgment in replevin may sue on bond	1300
ATTACHMENT,	
cannot be levied on property held in replevin	708
property legally held under, not liable to replevin.....	52
writ of, must be lawfully executed or replevin will lie.....	314
plaintiff in, cannot replevin from the officer.....	310
property held in, may be replevied when	300
property under, may be replevied by any third party.....	309
replevin of attached property may be brought in any court,	330
writ of, how far evidence.....	1007
as a defense in replevin	804-6
levy of, merely suspended by replevin.....	720
lien of, will be protected in replevin.....	963
<i>See EXECUTION, CUSTODY OF LAW.</i>	
ATTORNEYS' FEES,	
should be allowed as damages when	920-1, 976
when recoverable on bond	1358
AUCTIONEER may maintain replevin, when.....	104, 133
AVOWRY,	
definition, pleas	731-733
pleas to.....	734
in case of reply necessary.....	838
the usual plea to the replevin of a distress.....	735
B.	
BAILEE,	
recovery by, is bar to action by principal.....	210
may replevy from a stranger to the title	210
entitled to full value against strangers.....	969
may replevy.....	133, 423
rights of a naked	166
is protected if he surrender to the true owner	217
may defend against the owner.....	211
may replevy from owner.....	211
rule of damages against owner.....	970
cannot set up title adverse to the owner	471
cannot dispute bailor's title.....	217
may defend against owner, when.....	211
if he pledge goods without authority, owner may replevy,	213
if he violate the terms of the bailment, replevin lies by	
owner	212
where he exceeds his authority, replevin lies.....	512
interest may be levied on, and bailor cannot replevy	215

INDEX.

881

	SECTION.
BAILOR,	
must tender amount of lien	218
if the whole interest be levied on, real owner may replevy,	216
owner may replevy when terms of bailment are violated...	212-14
BAILOR AND BAILEE.....	106, 207-18
one dealing with an agent or bailee must learn the extent of his authority	207
<i>See AGENT.</i>	
BAND, rights of members of, as to instruments	114
BANKRUPTCY,	
assignee in, when protected from replevin.....	319
assignee in, may replevy.....	319
effect on contract of sale.....	281
does not release sureties on bond.....	1334
BAR,	
plea in, good.....	769
<i>See ANSWER.</i>	
BARTERED PROPERTY, when repleviable	417-18
BILL OF LADING,	
holder of, may replevy the property described in.....	103
BIRDS may be replevied	70
BOARDS built into a house not repleviable.....	382
BONA FIDE HOLDER, demand must be made of.....	467, 472
BOND,	
its importance and conditions.....	665-703
a good, necessary to valid service.....	693
must be given in replevin.....	52
neither poverty nor wealth excuses from giving.....	666-7
in replevin indispensable	675
object of requiring.....	676
for benefit of plaintiff and officer both	676
its conditions and history at common law.....	669
requisites of a statutory.....	670-2
exact form or name not important	692
statutory, may be required by court.....	677
amount of, in England.....	7
amount, how fixed.....	687-8
must be prepared by plaintiff.....	641
should run to defendant.....	685
uncertain in amount invalid	699
when invalid	690
not void for mere technical defects	696
may be good though not conforming to the statute.....	673
mere informality in, not fatal.....	682
need not be under seal when	683
its several conditions are separate and distinct.....	671

BOND—Continued.

SECTION.

time allowed in which to execute	684
sheriff should hold property to allow time to give	640
what is proper execution	681-4
executed by surety alone sufficient	682
objections to sufficiency of, how made	695
when sufficiency of must be excepted to	694
can be amended	697-8
court may permit new one to be given, when	680
practice where bond is given before writ issues	691
takes place of security for costs, when	700
in replevin sheriff responsible for a good	638
if good when taken, sheriff not liable	689
sheriff the sole judge of sufficiency	678-9
sheriff liable for not taking proper bond	686
lost by officer, damages for	639
money deposited in lieu of, may be garnisheed	719
effect on title	702
plaintiff does not acquire new title by giving	703
liable for loss or destruction of property	723-5
in replevin under special act must conform to act	674
redelivery—	
waives certain defenses	701
rule of damages in suit on	1357
validity and construction of	1282-93
should be construed liberally	1282-3
must be delivered to be valid	1285
delivery of the property sufficient consideration for,	1284
may be valid though not signed	1286
may be good though not conforming to statute	1287
not dated, dates from delivery	1288
mistake in body as to name not fatal	1290
disability of one surety does not release the others	1293
taken under repealed law, void when	1289
change in plaintiffs does not affect	1331
illustrations of void bonds	1292
breach of	1250-68
what is a	1250
action for only accrues on termination of replevin	
action	1264
failure in the suit is a	1260
cannot occur after the successful termination of	
the suit	1322-3
ordinarily obligation refers to final termination	1263
obligors may limit their liability to first trial	1262
condition to prosecute with effect, defeat is a	1253-4

BOND—Continued.**Breach of—Continued.**

condition to prosecute without delay, how broken	1251
what is an unusual delay.....	1252
failure to enter in court is a.....	1257-8
nonsuit is a.....	1256
dismissal is a.....	1255
failure to pay money judgment is a.....	1268
failure to pay costs is a.....	1268
condition to return, the most common.....	1265
a demand for a return not necessary to.....	1266
judgment of return conclusive as to.....	1267
death of party to suit is not a.....	1261
abatement of suit by removal of court is not a....	1259

liabilities of sureties.

how courts regard sureties on.....	1308
release to principal will discharge surety.....	1310

*See SURETIES.***liability of—**

principals and sureties on.....	1307-37
principal on.....	1307

recitals of, cannot be contradicted..... 1330**liability on—**

not lessened by change of defendants.....	1332
not changed without consent of obligee.....	1319
sureties bound by a confession of judgment.....	1315
sureties not bound by a fraudulent judgment.....	1316

action on—

how brought.....	1269-81
debt the proper form of.....	1269
what facts must be alleged.....	1270-1
one cause well stated sufficient.....	1274-6
copies of pleadings in replevin not necessary to....	1272
barred by time same as any other action.....	1299
plaintiff must occupy consistent position.....	1387
allegations as to return.....	1276
malice need not be alleged.....	1278
defect apparent in face of bond reached by demurrer	1280
variance between bond and petition, effect of.....	1281
allegations by one having a limited interest.....	1277
how suit brought on lost bond.....	1306
where executed in wrong name.....	1279
proper evidence in an.....	1385-6
how brought in particular cases.....	1302

parties to suit on.....1294-1306

who are proper.....	1294
---------------------	------

BOND—*Continued.*Parties to suit on—*Continued.*

the real party injured the proper plaintiff.....	1297
stranger to replevin action cannot be a.....	1298
a substituted plaintiff may be a.....	1301
assignee of judgment may sue on.....	1300
all parties interested may join in suit on.....	1303-4
joint obligors should join in suit on.....	1304
by use in name of sheriff, who are.....	1296
in suit by officer for use, etc.....	1295
defenses to	1360-94
what are proper, generally	1360-1
alteration in, is a good.....	1362
plaintiff's possession is a good.....	1392
satisfaction, no judgment, and release all good....	1375
plea must answer all material allegations	1372-3
where replevin not tried on merits greater latitude allowed in.....	1369-71
effect of return after suit brought as a	1391
return to be must be full and complete.....	1388-9
setoff allowed, when.....	1383
property in a stranger not a good.....	1365
that property cannot be returned, not a.....	1377
property <i>eloigned</i> or died how far a.....	1376
title acquired since replevin action, not a.....	1390
obligors cannot go back of judgment in replevin..	1366
defects in replevin proceeding are not	1367-8
cannot contradict the judgment in replevin	1363-4
must not contradict ground of recovery in replevin	1387
answer held not good in special cases	1374
measure of recovery on	1338-59
as to costs and attorneys' fees	1358
nominal damages only allowed when.....	1355
in case of distress.....	1351
between mortgagor and mortgagee.....	1354
in case of attached property.....	1348-9
in case of partners.....	1353
by one having special interest only	1352
in case property not moved.....	1347
loss to business not recoverable on.....	1340
where part of the goods returned injured—rule....	1350
where value not found, actual value allowed.....	1346
where suit dismissed, is compensation only.....	1356
interest on the value found in replevin allowed, when	1345
value found in replevin suit, an item in	1344

BOND—*Continued.*

Measure of recovery on—*Continued.*

damages, how determined	1349
not limited by jurisdiction of court, when.....	1342
proper limit of damages recoverable.....	1343
interest on the penalty of the bond allowed, when,	1359
vindictive or punitive damages not allowed.....	1341
should be compensation only	1338-9

in mitigation of damages on—

what may be shown.....	1378-94
what not allowed.....	1384
illustration	1380
stranger to title entitled to no favor.....	1379

defenses to, part payment in another action is *pro tanto*, 1381-2

See WRIT, SERVICE OF.

BUILDINGS,

when personal property.....	1041
when repleviable	363-5
are <i>prima facie</i> real estate and not repleviable	364
attached to land by a trespasser, when repleviable	381
may become personal property by agreement.....	365

See HOUSE.

C.

CARRIER—COMMON,

freight may be replevied from, when	515-6
to replevy from, proper charges should be tendered.....	516

CARRIER'S LIEN,

depends on possession	159-61
replevin will not lie without tender of amount of, when....	521

CEPIT IN ALIO LOCO,

plea of.....	741
--------------	-----

See NON CEPIT.

CHANGE IN FORM OR VALUE.

of property, rule as to damages.....	389, 909
--------------------------------------	----------

See GOODS CHANGED IN FORM.

CHATTELS,

severed from realty, repleviable	382
actual severance, when not necessary.....	385
may be so attached to realty as to be not repleviable.....	382
illegally severed may be replevied at once.....	384
severed by mistake repleviable by true owner.....	386

See CROPS, HOUSE, FIXTURES.

CHECK, a, may be replevied	76
----------------------------------	----

CHOSE IN ACTION may be replevied.....	81
---------------------------------------	----

	SECTION.
CHURCH or other society may replevy	423
CIVIL LAW, rule of, as to property changed in form	389
CLAIMANT,	
should intervene when	301
one of two cannot replevy crop raised by the other.....	377
<i>See</i> OWNER.	
CO-DEFENDANTS, who may be	441
COFFIN not subject to replevin.....	71
COGNIZANCE, definition, pleas.....	732-3
COLLECTOR. <i>See</i> TAX.	
COLORABLE TITLE, rights of holder by, in replevin.....	387
COMITY OF STATES.....	320
<i>See</i> SISTER STATES.	
COMMISSION GOODS, not a conditional sale.....	254
COMPLAINT.....	525-603
and affidavit need not be separate.....	586
may be used as an affidavit.....	588-9
in replevin, what is a good.....	590-1, 593
<i>See</i> AFFIDAVIT, DECLARATION, PETITION.	
CONDITIONAL SALE.....	106
seller may replevy on a, when.....	112
when demand necessary in case of.....	502
CONFUSION OF GOODS.....	399-409
general rule.....	399
how action brought in cases of.....	204-5
the person not at fault may replevy the whole.....	205
loss, if any, must fall on the guilty party.....	403
occasioned by willful act, all right to common mass is lost,	405
one who willfully does, can only replevy that not mixed..	407
rights of owner against a stranger	409
confusion by agreement creates tenancy in common.....	408
by consent, both have common interest in mass.....	405
as to articles which can be identified, no mixture.....	406
part of mass may be replevied, when	400-2
separable into aliquot parts, repleviable.....	400
part of pound, bushel, or bale not repleviable.....	402
CONSIGNEE,	
may bring the action	153
may replevy freight from a common carrier.....	515
CONSIGNOR may replevy his property	254
CONSOLIDATION of two actions of replevin not allowed, when,	1224
CONSTABLE. <i>See</i> SHERIFF AND OFFICER.	
CONSTRUCTIVE POSSESSION, what is, to support replevin.....	438
CONTEMPT OF COURT,	
to replevy goods in custody of law, old rule.....	299
is a, to disturb possession of property replevied.....	718

CONTEMPT OF COURT—Continued.	
defendant secreting or driving away property not in, when.....	657
not a, to replevy to test legality of levy, modern rule.....	300
CONTRACT,	
cannot be enforced by replevin	289
rescission of. <i>See</i> VENDOR AND VENDEE.	
obtained by fraud conveys no title.....	264
CONTRIBUTION between sureties on bond proper.....	1336
CONVERSION,	
by defendant will excuse demand.....	459
in case of a demand not necessary.....	474
should be shown when	994
CORONER.	
writ directed to, when sheriff a party	614
<i>See</i> SHERIFF AND OFFICER..	
CORPORATE RECORDS may be replevied.....	69
CORPORATION , how affidavit in replevin made by.....	562
CORPSE not subject to replevin	71
COSTS,	
effected by demand.....	468
security for, when covered by bond in replevin.....	700
judgment allowed to successful party.....	1156
within the discretion of the court.....	846
of court and for retaking, recoverable on the bond	1358
failure to pay is a breach of bond	1268
COUNTER-CLAIM. <i>See</i> SETOFF.	
COUNTY WARRANT may be replevied.....	81
COURT,	
may permit new bond to be given, when.....	680
should require statutory bond.....	677
should allow bond to be amended.....	697-8
cannot interfere with discretion of officer.....	678
when may compel defendant to surrender property.....	656
how far may control answer of defendant.....	766
COURT RECORDS AND SEAL may be replevied.....	75
CREDITORS may join as plaintiffs.....	138
CROPS,	
can be replevied.....	73
general rule with regard to.....	359
property severed from realty, repleviable when.....	354
trees, grass, and houses, etc., are real or personal prop- erty according to circumstances.....	353
when growing, are personal property—Instruction.....	1042
on leased land cannot be replevied by landlord	33
and plants reserved in deed of land are subject to replevin	385

	SECTION.
CROPS—Continued.	
grass and trees when severed may be replevied	375
how effected where title to the land is in litigation	361
a growing, pass with sale of realty	356
purchaser of land may replevy	357
severed from sold land, repleviable by vendee, not by ven- dor	379
rule different where nothing paid for the land	380
are covered by mortgage on land	357
purchaser at judicial sale of land cannot replevy crop be- fore confirmation	358
mortgagee cannot replevy crop severed before he took possession	360
not repleviable by one of two adverse claimants of the land	377
cannot be replevied by disseizor	381
attached to land by a trespasser, pass with it	383
CROSS-REPLEVINS,	
recaption	1218-35
defined, illustration	1226
not allowed, why	1225
another action pending is a good defense	1222
former replevin good in bar of second suit	1223
distinction between replevin and other writs	1218
issues tried in one action not triable in another	1221
property held by special writ not repleviable	1219
claimant cannot replevy, when defeated in trial of right of property	1220
not allowed by grantees of first parties	1227
<i>See SECOND REPLEVINS.</i>	
CUSTODIA LEGIS,	
property replevied is in	704-725
money deposited in lieu of bond, not in	719
CUSTODY OF LAW. See GOODS IN CUSTODY OF LAW.	
CUSTODY OF PROPERTY,	
when taken in replevin	704-25
at common law	704
status under the codes	705
property taken in replevin is in custody of law	706
is under the control of the court	707
while suit pending, cannot be interfered with	708
cannot be interfered with by another court	709
of sister state courts, respected	717
interfering with, is contempt, when	718
surety on bond cannot control	725
sheriff liable for, before bond given	711

CUSTODY OF PROPERTY—*Continued.*

SECTION.

plaintiff has a right to, while suit pending.....	712
plaintiff responsible for loss of goods.....	724
plaintiff responsible for injuries to goods.....	723
redelivery bond entitles defendant to.....	714-15

D.

DAMAGE FEASANT. *See* DISTRAINT.

DAMAGES.....	844-976
a distinction between, and value	850
rule of, in emancipation of slaves	871
a difficult subject	844
history and general remarks	845
given in England	7
measure of.....	17
for conversion, cannot be recovered by replevin.....	56
cannot be recovered in an independent action.....	847
independent suit for, barred by replevin	1170
must be confined to the wrongful taking or detention.....	848
should be assessed by the jury.....	859
cannot exceed that claimed by plaintiff	861
may be given in excess of limited jurisdiction, when.....	1095
judgment for.....	1148-9
when a primary object in replevin	24
replevin is a suit for, where property not taken.....	664
may be enlarged by amendment.....	570
may be given notwithstanding dismissal.....	1198-9
rule of, where successful party is repossessed	876
should be placed high to compel a return.....	904
defendant not entitled to, unless he claim a return.....	851
above compensatory, largely in discretion of jury.....	929-30
may be allowed to both parties.....	846
only nominal, allowed where defendant had no title.....	1355
rule of, where the successful party has right to elect.....	858
may be cut down by court, when.....	1088
between vendor and vendee. <i>See</i> VENDOR.....	899
for malicious bringing of replevin are recoverable.....	1394
for failure to return are recoverable from replevin, not from appeal bond.....	1393
as affected by demand	951
always given against an intruder.....	966
actual only allowed on proof.....	950
nominal are incident to success.....	949
full indemnity the object of all rules on.....	943
more than nominal must be proved.....	950, 1087

DAMAGES—Continued.**SECTION.**

special, must be specially pleaded.....	603
special, must be specially proved.....	934
verdict should find amount of.....	1074-5
in conclusion, author's suggestions.....	976
summary, rules of.....	975
cannot be given for detention, use, and value too.....	961
in case of a mortgagee.....	953-6
rule of, between mortgagor and mortgagee.....	185
measure of, between joint owners.....	905
in case of an officer—	
in favor of an officer, is face of his writ.....	957
in favor of officer, is the value of his writs.....	959
if officers' writs are for too much, he can only re- cover the true amount.....	960
as against an intruder, officer entitled to full value,	965
against an officer seizing under a writ.....	967
seldom more than actual allowed against an officer,	933
measure of, where officer has lost bond.....	639
where right founded on special ownership—	
special owner allowed full, against a stranger.....	968
rule in case of bailor, trustee, special owner, etc.....	969-71
in suit for note or evidence of debt.....	900
in case of keepsakes, souvenirs, etc.....	903
measure of, in case of stocks, is value on day of trial.....	901
rule as to, where only part of the property is recovered...	952
prospective profits not allowed.....	972-3
probable profits sometimes allowed.....	974
where value changeable—	
rule as to value where fluctuating.....	939-40
value of gold coin, when fluctuating, how fixed.....	948
rule where market is distant.....	946
how highest market value determined.....	942
value should be fixed where unlawfully taken.....	944
rule in trover a guide as to value.....	945
rule of value where value not stable.....	941
value should be fixed as of what time generally....	937
value at time of taking, with interest and costs, the proper rule.....	910
value when fixed as of time of trial—Rule.....	938
increased value may be shown by amendment.....	911
where value increased in good faith, rule.....	913
where value changed by wrongdoer—	
rule of, where value increased by wrongdoer.....	912
increased value not recoverable by a wrongdoer...	947
not favored to a willful trespasser.....	908

DAMAGES—Continued.

SECTION.

where value changed by wrongdoer—Continued.	
general rule, where property changed in form.....	909
for property severed from real estate.....	906
where property severed and increased in value to good faith.....	907
party claiming must not be guilty of contributory negligence.....	931
wrongdoer cannot make a profit	932
rule same as in trespass.....	925
when vindictive given—	
more than compensatory must be pleaded and proved.....	927
actual malice must be shown to get more than compensatory.....	928
what are punitive, exemplary, and vindictive.....	926
punitive, exemplary, or vindictive may be given...	924
interest as a measure of.....	877
interest not always the proper measure of damages	886
rule as to interest same as in trover.....	881
interest and profits both cannot be allowed.....	885
interest is not special.....	882
interest not allowed where property returned.....	883
interest discretionary with the jury.....	884
where property not taken is value with interest...	880-1
ordinarily interest should be allowed as.....	879
interest not allowed as prior to time value fixed...	878
value of use as a measure of.....	887-8
usable value a proper element of damages.....	891
what should be considered in estimating.....	890
excessive must not be allowed for use.....	889
party claiming use must show right to use it.....	897
one not entitled to use the property can not re- cover for use.....	895
for value and use both not given.....	894
for use not recoverable in a separate action.....	893
for use need not be specially claimed.....	892
interest not proper where there is a usable value...	887
interest may be allowed on usable value.....	898
costs and expenses incurred in—	
expenses of taking and removing proper as.....	923
expenses, counsel fees, etc., an element in, when....	920
money spent in the pursuit of property not proper	921
time spent in attending the suit, etc., not allowed as.....	920-1
money paid to procure a bond not proper as	922

DAMAGES—Continued.

SECTION:

rule where property decreased in value.....	902
depreciation by loss of time an element in.....	915
depreciation in value an element of.....	914-15
where holder neglects the property he is liable in..	916
loss from interruption of business an element of..	919
deterioration in hands of holder an element in.....	918
expenses for doctoring and care by the holder an element in.....	917
in favor of defendant—	
rule where defendant prevail.....	856-7
where defendant keeps the property.....	870
damages for defendant where here-acquires possession	866
for defendant where plaintiff has had possession...	865
special damages when allowed in favor of defendant.....	935
in favor of plaintiff—	
measure of plaintiff's where he cannot give bond...	864
for plaintiff where he has had possession.....	863
general rule where plaintiff prevails.....	853
how affected by plaintiff's interest.....	854
if plaintiff prevail but property has not been delivered.....	855
rule where plaintiff prevails but defendant has property.....	852
mitigation of damages—	
what proper in.....	849
possession during suit may be shown in	875
where property lost or destroyed.....	872
death or destruction of the property. effect of on..	867-72
death of the property may be shown in.....	831
not lessened by delivery of property to a receiver	873
that property has been transferred is proper in....	874
how assessed on a nonsuit. <i>See DISMISSAL</i>	860
may be reduced by set-off.....	795
measure in suit on bond. <i>See BOND</i>, measure of recovery	
ON	1338-59
what may be shown in mitigation of on bond.....	1378-94
in suit on bond by one having special interest.....	1352
death—	
or destruction, effect on damages.....	867-72
of a party, effect of.....	800-2
of party to, effect on bond.....	1261
DECEDENT , demand, how made in case of.....	484

INDEX.

893

	SECTION.
DECLARATION.....	525-603
what it should contain.....	593-7
must follow affidavit.....	595
<i>See AFFIDAVIT, COMPLAINT, PETITION.</i>	
DEED, may be replevied.....	79
DEFENDANT	
rule of damages if he prevail.....	856-7
must claim a return to get damages.....	851
damages.....	865-6
in execution may replevy exempt property.....	332
separate may have separate judgments.....	1143
separate entitled to separate verdicts.....	1081
right of not extinguished by finding the property.....	58
when changed by substitution.....	444
possession, manner of, does not waive demand, when.....	513
bound by reasons given when demand made.....	475
proper. <i>See PARTIES.</i>	423-46
replevin will lie against whom.....	58
must have actual or constructive possession.....	431-3
must have had control over the thing.....	134
replevin will not lie against an officer who has turned the property over.....	62
levy without possession no ground for replevin against..	63
what is possession by an officer.....	62
officer after levy of process is a proper.....	436-7
a receptor is a proper.....	59
must have possession or the action will not lie.....	61
one who never has had possession cannot be made a.....	132
must have actual or constructive possession.....	64-5
exceptions where property wrongfully transferred.....	66
the one actually detaining is the proper.....	431-2
when an assignee of property a proper.....	434-5
when judgment plaintiff may be made.....	440
the person in actual possession is the proper.....	443
who may be joined as.....	441
one of two wrongdoers may be sole.....	442
when court may compel a, to surrender property.....	656
does not have to assist officer in service of the writ.....	655
liable for secreting or driving away property, when.....	657
one who pays takes the title.....	1175
a, giving bond entitled to custody of property.....	714-5
change of, does not release bond.....	1332
DEFENSES.....	783-836
generally.....	783
must relate to the commencement of the action.....	796
courts should strive to do justice between the parties.....	794

	SECTION
DEFENSES— <i>Continued.</i>	
what are waived or lost by failure to plead.....	828
what, waived by giving a redelivery bond.....	701
good faith does not make wrongful taking right.....	464
examples of.....	825
that the property is not identical is a.....	822
title in a third person is a good.....	784-7
title in a defendant is a good.....	821
judgment in trover for the conversion is a.....	820
joint tenancy is a good.....	237
title acquired from plaintiff is a.....	819
possession under a tax warrant is a.....	818
title by possession alone may be a good.....	817
possession alone is a good, against a wrongdoer.....	84
special right of possession is a good.....	815
former judgment as a, how pleaded.....	811
former judgment to be, must be on same issue.....	812
for judgment to be, must be final.....	810
pendency of another action is a defense.....	809
trial of right of property, how far a.....	808
justification under a writ as a.....	803-7
destruction by act of God as a.....	830
a foreclosure in chancery is a.....	836
when plea in abatement proper as a.....	814
plea in abatement must contain what.....	813
death of a party as a.....	800-2
estoppel is a good.....	799
remedy by intervention not exclusive.....	790
rule as to, where claimants have to intervene.....	789
what are proper, in case of a distress.....	827
lien in a third party not a good.....	816
failure of plaintiff's title after suit brought is not a.....	798
cannot be changed after suit brought.....	797
improper, examples of.....	829
purchase at public sale not a good.....	834
a taking by a soldier when not a.....	832
a garnishment is not a, when.....	833
set-off against the damages proper.....	795
death of the property a mitigation of damages.....	831
an unsatisfied prior mortgage no.....	193
part payment not a, to replevy by mortgagee.....	183
usury a proper, to replevin by mortgagee.....	793
prior mortgage not a good.....	788
right of homestead not a good, against the mortgagee...	835
to suit on bond. See BOND, DEFENSES TO.....	1360-94
based upon special law, how pleaded.....	826

INDEX.

895

SECTION.

DEFENSES—*Continued.*

fraud as a..... 823-4

See ANSWER.

DEFINITION of replevin..... 2

DEMAND,

generally..... 447-524

instructions as to..... 1043-6

See TENDER TO DISCHARGE LIEN.

necessary when, rule..... 447

object of, to establish a conversion, etc..... 452

must be made before action brought..... 467

by whom made..... 452

effect of, on costs..... 468

effect of, on damages..... 951

may be waived..... 467

failure to make a, may be waived..... 451

is waived by plea of title in defendant..... 448

is not waived by general denial..... 467

is waived by claim of ownership by defendant..... 510

and refusal do not make a conversion..... 449

should be made before suit brought..... 476

after suit brought, not good..... 477-8

effect of a conditional refusal to deliver on..... 474

refusal to deliver must be by one in possession..... 481

no particular form of, necessary..... 483

sufficiency of..... 510

a written, must be specific..... 483

in violation of injunction is bad..... 487

on whom made..... 481

on agent of limited authority not good..... 467

of person in charge sufficient..... 484

must be made by a "stranger"..... 170

if proved, failure to allege is cured..... 482

acts and notice equivalent to..... 485

how made in case of a decedent..... 484

of indices or badges of ownership, when sufficient..... 486

necessity of a, not affected by manner of possession, when, 513

the time of, when value should be fixed..... 937

what acts of dominion by defendant will excuse a..... 459

excused by acts of conversion by defendant..... 459

title of record no excuse for..... 460

must be made by an assignee..... 461

necessary by mortgagee..... 198

must be made by mortgagee before action lies..... 172

must be made by a mortgagee..... 488-90

mortgagor entitled to from mortgagee..... 491

DEMAND—*Continued.*

SECTION.

mortgagor must make, to replevy back.....	493
not necessary for property taken under illegal mortgage.....	494
must be made where defendant has lawful possession.....	462
must be made where original taking is not wrongful.....	458
when defendants' title acquired in good faith, demand necessary.....	454
must be made of <i>bona fide</i> holder.....	467
is necessary from a borrower.....	471
is necessary for lost goods.....	471
necessary where possession is in good faith.....	472
necessary where defendant has a right for a time.....	480
necessary of purchaser at judicial sale or officer.....	496
when necessary of a sheriff.....	497-9
necessary in case of exempt property, when.....	500
necessary for exempt property after sale.....	501
by purchaser, necessary before replevin of purchase.....	508
when necessary for property partly paid for.....	502
by vendor, when necessary.....	258
necessary between vendee and vendor.....	505-7
not necessary—	
where vendee guilty of fraud.....	503
but if third party in possession, demand necessary.....	504
against a wrongdoer.....	457, 469
where trespass committed in the taking.....	463
where A's property taken for B's debt.....	466
where wrongful taking and detention relied on.....	453
where defendant's title acquired by fraud.....	454
where wrongful detention is ground of action.....	455
by trustee, when.....	492
for stolen goods.....	455
in cases of fraud.....	456
for goods obtained by fraud.....	465
where both parties claim title.....	450
where it would be unavailing.....	474
where there is a refusal to deliver in advance.....	474
where taken under void contract.....	495
where agent exceeds his authority.....	511
DENIAL, GENERAL.....	750-6
evidence under a.....	1001-3
does not waive demand.....	468
<i>See ANSWER.</i>	
DERELICT PROPERTY.....	164
DERIVATION of the word replevin.....	2

DESCRIPTION,	SECTION.
in replevin affidavit, particular.....	547-54
more particular required than in trespass or trover.....	544
in writ should follow affidavit.....	617-18
in verdict must be certain.....	1066-7
insufficiency of, waived by answer.....	727
<i>See AFFIDAVIT.</i>	
DETENTION, what is wrongful.....	288
DETINUE,	
supposed a bailment.....	18
differs from replevin.....	18
DISMISSAL,	
cannot be made to detriment of plaintiff.....	1193-9
if court have jurisdiction, cannot be by one party.....	1210
slight grounds not sufficient for.....	1211
effect of judgment for.....	1217
may be stipulated for.....	1215
right to may be lost if not acted on.....	1212
proper where defendant still has the property.....	1197
court cannot compel plaintiff to prosecute.....	1201
damages may be given notwithstanding a.....	1198
affirmative relief not given without notice to plaintiff.....	1200
a return should be ordered on a.....	1118-20
where writ quashed, damage should be given.....	1199
title to property not settled by.....	1205
for want of jurisdiction, return not ordered.....	1209
can not appeal and move to dismiss too.....	1202
a judgment of, may be reviewed on error.....	1242
agreement to arbitrate may be a.....	1214
by plaintiff is a breach of his bond.....	1255
rule of recovery on bond, in case of a.....	1356
<i>See NONSUIT.</i>	
DISSEIZIN.....	381
<i>See CROPS, TREES, HOUSES.</i>	
DISTANT MARKET, guide as to value.....	946
DISTRAINOR,	
if he lose possession cannot retake by replevin.....	350
impounded animals not subject to replevin.....	351
special remedy to test distraint must be followed.....	352
DISTRAINT,	
impounded animals not repleviable if proceeding regular	348-9
DISTRESS,	
history.....	37-47
chief use to collect rent.....	39
could not be sold at first.....	40
could be sold later under statute of 2 W. and M.....	41

	SECTION.
DISTRESS—Continued.	
theory out of which distress grew.....	42
must be an actual demise.....	43
rent must be past due.....	44
would lie for any kind of rent.....	45
could be made on or off the land.....	47
what triable in the action.....	48
proper venue in.....	49
after tender of amount due tenant may replevy.....	50
little used in United States.....	43-46
replevin of a, avowry the usual plea.....	735
defenses proper in.....	827
measure of recovery on bond in case of.....	1351
DURESS , mortgage given under will not support replevin.....	200
DWELLING HOUSE may be replevied.....	69

E.

EFFECT OF JUDGMENT	1157-78
<i>See JUDGMENT, EFFECT OF.</i>	
ENHANCED VALUE of goods taken.....	390
<i>See GOODS CHANGED IN FORM.</i>	
EQUITABLE RIGHT ,	
to possession alone will not support replevin.....	60
EQUITABLE TITLE alone not good.....	100
EQUITIES should be considered in replevin	1148
EQUITY , suit in, not barred by former replevin.....	1167
ERROR	1236-49
general principles.....	1236
proceedings in must be by real party in interest.....	1237
joint parties should join in prosecuting.....	1238
may be taken from judgment of dismissal.....	1242
presumption is in favor of trial court.....	1243
right to prosecute may be waived.....	1241
illustrations of practice in.....	1240
<i>See APPEAL.</i>	
ESTOPPEL ,	
when available.....	147
when effective.....	125
may be shown under general denial.....	753
a defense in replevin, when.....	799
judgment in replevin, when an.....	1163
ETYMOLOGY of the word replevin.....	2
EVIDENCE	977-1023
should not be pleaded.....	749
nature and scope of, generally.....	977

EVIDENCE—Continued.

SECTION.

must be confined to issues made by pleadings.....	978
confined to status at commencement of suit.....	979
of matters after the commencement of the suit, when.....	1012
when, of right of possession at former time proper.....	98
governed by issues made.....	980
facts admitted need not be proved.....	981
of negative averments not necessary.....	534-5, 982
conversion should be shown, when.....	994
of all matter necessary, admitted.....	983
of possession at commencement of the suit, necessary.....	989
plaintiff must show that defendant had possession.....	433
what is proper, of possession.....	990
of possession, what is.....	991
of ownership, is of right to possession.....	1018
possession is, of ownership.....	1017
peaceful possession is, of title.....	84
naked proof of possession alone not sufficient.....	87
of title without right of possession not good.....	128
of possession will at least compel defendant to show his right to the property.....	136
identity of the property should be shown.....	992
necessary where the contest is one of title.....	1006
how far title to real estate may be shown.....	1023
of title of land in replevin when proper.....	376
illustrations of proper, in particular cases.....	1019-20
as to place of detention, need not be definite.....	1016
of <i>res gestæ</i> admissible.....	984-7
declaration of party in possession when admissible.....	987
declarations of plaintiff are not, when.....	553
declarations of third persons, when admissible.....	985
in case of rescission of contract by a vendor, rule of.....	278
how far statement of a vendor is.....	988
matter, too remote to be.....	1021
what may be given under general denial.....	751-6
what is a variance in.....	993
variance in from affidavit fatal.....	545
of value, what proper.....	998-1000
what proper under a general denial.....	1001-3
value not usually in issue.....	995
what proper, of value.....	923, 996-7
proof of demand not necessary when.....	467
of demand, time when it should be made.....	479
failure to prove demand, effect of.....	479
proper under <i>non detinet</i>	1004
proper in case of exempt property.....	1022

	SECTION.
EVIDENCE—Continued.	
proper where fraud is the issue.....	1014-15
under plea of property in defendant.....	1005
writ of attachment is proper for what purpose.....	1007
of official character of officer when necessary.....	1008
in case of title under a writ.....	1009-11
rule of, in title based on an execution.....	1013
rule of, in replevin by mortgagee.....	176
mortgage alone not sufficient evidence of title.....	206
proper in suit on bond.....	1385-6
instruction as to burden of proof.....	1036
EXCESSIVE CHARGES. <i>See</i> CARRIER.	
EXCHANGED PROPERTY may be replevied, when.....	393, 417-18
EXCHANGE OF PROPERTY,	
note taken for should be tendered back.....	517
EXECUTION,	
property legally held by, not subject to replevin.....	52
void on its face or from court of no jurisdiction, no protection.....	312
writ must be lawfully executed or replevin will lie.....	314
a stranger to the writ may replevy.....	54
property held under an, may be replevied, when.....	300
an, cannot be levied on property taken in replevin.....	708
<i>See</i> CUSTODY.	
levy of an as a defense in replevin.....	806-7
lien of an, merely suspended by replevin.....	720
measure of damages in replevin against an.....	958
title based on, rule as to evidence.....	1013
<i>See</i> ATTACHMENT.	
EXECUTION DEFENDANT,	
may not replevy.....	137
an, can replevy, when.....	332
EXECUTION OF BOND.....	681-4
<i>See</i> BOND.	
EXECUTION PLAINTIFF,	
not a proper party to replevin suit.....	437
an, who directs officer liable in replevin, when.....	440
EXECUTOR may replevy.....	424
EXEMPLARY DAMAGES.....	924
meaning of the term.....	926
must be pleaded and proved.....	927
not allowed in absence of malice.....	928
largely in discretion of jury.....	929-30
<i>See</i> PUNITIVE, VINDICTIVE, AND DAMAGES.	
EXEMPT PROPERTY,	
may be replevied.....	306-8

INDEX.

901

EXEMPT PROPERTY—*Continued.*

SECTION.

repleviable when.....	332
what notice and demand necessary in.....	500
averments in, replevin of.....	536-7
evidence in case of.....	1022
a purchaser of, at an execution sale entitled to demand...	501
EXPENSES,	
when allowed in damages.....	920
of taking and removing the property, proper damage....	923
in searching for property part of the damage.....	918
EXPENSES ADVANCED, when not recoverable in replevin.....	524
EXPRESS COMPANY. <i>See</i> CARRIER.	

F.

FENCE placed on land of another by mistake may be replevied...	373
FENCE RAILS AND STAKES not repleviable by owner, when...	388
FI. FA., levy under, as a defense in replevin.....	807
FINDER,	
of property has a lien for reward.....	163
may replevy from a stranger.....	164
FINDING	1049-85
construed liberally.....	1050
construed same as verdicts.....	1053
may be partly for defendant and partly for plaintiff.....	1082
<i>See</i> VERDICT.	
FINE, property taken for not repleviable.....	52, 534
FIRE COMPANIES, rights of members.....	114
FIXTURES,	
part of the realty.....	367-8
severed from the realty are personal property.....	369
may be removed by owner while in possession.....	366
FIXTURES, TRADE,	
cannot be replevied.....	370
character of may be determined by replevin.....	371
FOAL, unborn, rule as to replevin of.....	397-8
FORMA PAUPERIS, replevin cannot be prosecuted in.....	666
FORMER REPLEVIN as a bar.....	1163
FORM OF AFFIDAVIT, rules as to.....	581-4
FORMS OF THE ACTION of replevin.....	46
FRAUD	410-22
distinction between and theft.....	416
statute of, will not support replevin.....	118
in sale, a ground of replevin	262
owner may replevy goods obtained by, wherever found...	413
in use of process of court, replevin lies.....	414

	SECTION.
FRAUD—Continued.	
trade or barter obtained by, replevin lies.....	418
possession obtained by, replevin lies.....	419
demand not necessary for goods obtained by.....	456, 465
a party to the, cannot replevy.....	421
judgment obtained by, will be set aside.....	1094
silence is not, concealment of facts may be.....	268-72
payment in counterfeit money is.....	269
may be shown under general denial.....	752
should be specially pleaded.....	781
burden of proof is on pleader.....	1015
as a defense in replevin.....	823-4
in case of, much latitude allowed in proof.....	1014
property passed to innocent purchaser cannot be replevied.....	415
<i>See THEFT, VENDOR.</i>	
FRAUDULENT REPRESENTATIONS avoid the sale.....	413
<i>See VENDOR AND VENDEE.</i>	
FREEMAN V. HOWE , rule in, discussed.....	324-6

G.

GARNISHMENT not a defense, when.....	833
GIFT , title by, not good.....	119
GOLD COIN , value when fixed.....	948
GOODS ,	
seized under void law repleviable.....	313
illegally seized repleviable in any court having jurisdiction.....	326
liquors, when repleviable.....	313, 316
powder condemned may be repleviable.....	315
exempt property may be replevied.....	306-8
seized by revenue collector not repleviable.....	318
taken under special proceeding not repleviable.....	317
held by special order of court not repleviable.....	323
held by United States marshal repleviable, when.....	324-6
rule where commingled.....	399-409
<i>See CONFUSION OF GOODS.</i>	
changed in form—	
or enhanced in value.....	389-398
<i>see</i> SILSBURY v. MCCOON	909
rule under civil law.....	389
modern rule	390
right of plaintiff not affected by change in, made by agreement.....	394
may be replevied by owner.....	390

INDEX.

903

GOODS—Continued.

SECTION.

Changed in form—Continued.

owners should move to reclaim his property at once,	395
should be described as they exist when action commenced.....	391
when identity is lost replevin will not lie.....	393
value increased by innocent purchaser not repleviable, when.....	396
natural increase of live animals, rule as to.....	397-8

acquired by theft or fraud.....	410-22
---------------------------------	--------

See THEFT, FRAUD.

wrongdoer could receive nothing for his labor by civil law,	389
---	-----

GOODS IN CUSTODY OF THE LAW.....299-332

subject to replevin	299
contempt of court to replevy.....	299
mere irregularities in proceeding not ground of replevin,	305
may be replevied where process of seizure is void.....	312

GOVERNMENT may replevy its property.....	404
--	-----

GRAIN, repleviable by aliquot parts from mass.....	400
--	-----

GRASS cut from the freehold may be replevied	375
--	-----

See CROPS.

GROWING CROPS. See CROPS.

GUARDIAN may replevy property of ward.....	423
--	-----

H.

HISTORY of replevin.....	1
--------------------------	---

HOLIDAY, verdict may be returned on.....	1080
--	------

HOTEL KEEPER may bring the action to protect lien.....	157
--	-----

HOUSE,

when real and when personal property. See CROPS.

on land of another may be replevied.....	363
attached to land without owner's consent, repleviable....	372
placed on land of another by his consent may be replevied,	373
removed unlawfully may be replevied.....	362
when repleviable by mortgagee of land.....	362

See BUILDINGS.

HUSBAND,

cannot replevy from wife.....	156
cannot replevy from abandoned wife.....	156

I.

IDENTIFIED, articles which can be, are repleviable.....	406
---	-----

IDENTITY,

changed rules as to damages.....	909
change of, what is.....page 488-493	
of property, must be shown.....	992

	SECTION.
IDENTITY OF PROPERTY, lost, cannot be replevin.....	393
IMMORAL CONTRACT will not support replevin	149
IMPORTANCE of the action.....	1
IMPOUNDED ANIMALS.....	348-52
<i>See DISTRAINT.</i>	
INCREASE of live animals, rule as to replevin	397-8
IN ESSE, property replevied must be.....	82
INFANT,	
may replevy.....	423
title based on promise by, will not support replevin.....	120
INJUNCTION,	
will not be granted to restrain replevin action.....	371
demand cannot be made in violation of an.....	487
effect of an, on pending suit in replevin	1213
will issue against suit on bond while replevin suit pending,	1264
INN-KEEPER'S LIEN, must be discharged before replevin.....	521
IN PERSONAM, when replevin is.....	21
IN REM, when replevin is.....	21
INSTRUCTIONS	1024-48
general theory of.....	1024
must be confined to issues involved.....	1025
when court may direct verdict.....	1026
as to detention	1027
as to when action lies.....	1028
as to right of possession	1029
as to what right will support replevin.....	1030
as to taking possession by officer.....	1031
as to passing of title between vendor and vendee.....	1032
where both parties claim the property.....	1033
as to damages	1034
as to damage for use	1035
as to burden of proof.....	1036
on wrongful detention.....	1037
as to wrongful detention by bailee.....	1038
on possession as evidence of title.....	1039
as to ownership of property.....	1040
on weight of evidence.....	1040
as to credibility of witnesses.....	1040
buildings, when personal property.....	1041
growing crops, when personal property.....	1042
demand not necessary.....	1043
demand necessary.....	1044
as to proper demand	1045
when necessary against an officer.....	1046
as to value of an officer's return as evidence.....	1047
on tender to discharge mortgage lien.....	1048

INDEX.

905

SECTION

INSURANCE POLICY may be replevied	69-74
INTEREST,	
as a measure of damages	877-87
may be allowed on the penalty of the bond, when.....	1359
<i>See DAMAGES.</i>	
INTERVENOR, proper judgment against.....	1153
INTERVENTION,	
when allowed in replevin.....	444-6
rule as to defenses, when third party must plead in.....	789-90
remedy by, not exclusive.....	790
when claimant must intervene....	301
remedy by, may be made exclusive.....	322
INTRUDER,	
no rights against an officer.....	965
is liable for damages, though defendant not the owner....	966
INVOLUNTARY DEPOSIT may be replevied.....	165
IRRELEVANT MATTER may be stricken out of petition.....	566
ISSUE is right of possession when writ issued.....	98

J.

JOINT DEFENDANTS, who may be.....	441
JOINT OWNERS.....	219-43
of crop, one cannot replevy from the other	225
one, cannot replevy property incapable of division	239
one entitled to exclusive possession may replevy.....	233-5
measure of damages in action between.....	905
one may mortgage his interest and replevin will not lie...	243
should join in replevin.....	227, 429-430
<i>See PARTNERS, TENANTS IN COMMON.</i>	
JOINT OWNERSHIP, what is.....	220
JOINT TENANCY is a matter of defense.....	237
JOINT TENANT,	
one cannot replevy from the other.....	219, 230-1
can replevy his interest from co-tenant who has converted it.....	236
levy by an officer on interest of one, not ground for replevin by the other	232
one, can sell and deliver his interest and replevin will not lie by the other.....	242
JUDGMENT,	
generally.....	1086-1156
must follow verdict.....	1086-7
may be modified as to damages.....	1088
form of, may be changed, when.....	1089
may be amended where clerk has made a mistake.....	1091

JUDGMENT—*Continued.*

SECTION.

error in entering, how corrected.....	1092
corrected <i>nunc pro tunc</i>	1090
power of court over.....	1094
proper entry of may be compelled.....	1093
confined to the issues in replevin.....	1096
should adjust all matters of difference.....	1148
cannot exceed amount claimed by pleadings.....	1097
must be certain and definite.....	1098
description in must be certain.....	1099
which can be made certain by reference to pleading good,	1100
must speak on all the issues involved.....	1101
must speak as to all the parties.....	1102
a, is supported by one good count.....	1103
when an alternative, is necessary	1104-7
alternative not necessary where property not taken.....	1107
right to alternative may be waived by successful party...1108-9	
how right to alternative waived.....	1109
for delivery alone sufficient, when.....	1110
for return necessary, when.....	1111
insolvency does not change right to a return.....	1113
may be for a return of part only of the property.....	1121
of return—	
a matter of right.....	1112
only rendered against one in possession	1114-15
allowed where property fraudulently transferred...	1116
awarded where plaintiff fails in the action.....	1117
should follow a nonsuit.....	1118
is the final order in replevin.....	1120
for part and damages for part proper.....	1121
should fix a time in which return is to be made....	1122
not necessary where successful party in possession..1123-4	
not necessary where property not taken.....	1125
not awarded to a disclaimer.....	1127
not awarded to one who pleads property in a stranger.....	1128
not awarded where property not in existence.....1129-30	
for young of animals born <i>pendente lite</i>	1132
right of property must beshown to entitle one to a return	1126
effect of failure to order a return.....	1133
of return, proper in favor of an officer.....1137-9	
effect on, of destruction of the property	1131
proper in case of a limited interest	1136
of return allowed where value of special interest not known	1141
for value only proper where a return ordered	1134
greater than value of goods given when	1140

JUDGMENT—Continued.

SECTION.

an absolute money, erroneous.....	1147
joint, when proper	1142-3
cannot be against one not a party.....	1144
what, proper in certain cases.....	1145
proper, against administrator	1151
against substituted defendant.....	1152
against intervenor.....	1153
against the sureties when proper.....	1155
for costs when and what is a proper.....	1156
for damages proper.....	1149
what, proper in replevin of mortgaged goods.....	195
for value proper where writ quashed.....	1199
on <i>non cepit</i> and <i>non detinet</i>	1146
stipulation for, will be enforced.....	1150
effect of.....	1157-78
generally.....	1157-8
in <i>non cepit</i> and <i>non detinet</i>	1160-1
how far conclusive	1162
as a bar or estoppel.....	1163-4
as conclusive in another action.....	1165-6
how far binding in other forms of action.....	1166
is a bar to suit for damages.....	1170
not a bar to suit in equity.....	1167
none on title unless strictly in issue.....	1168
is binding on the parties and their privies.....	1169
is conclusive in federal and sister state courts.....	1171
payment of a money judgment vests title.....	1174
payment on the title in dispute.....	1174-5
is to settle right to possession.....	1159
in replevin, a merger of what.....	1164
force and effect of.....	1178
defendant cannot replevy.....	332
purchaser of land at sale may replevy crops.....	357-8
in replevin, how enforced.....	1176
how satisfied.....	1177
return of property under a. See RETURN	1179-91
of return is conclusive.....	1267
of return, effect of	1216
of dismissal, effect of.....	1217
a failure to pay a, is a breach of bond.....	1268
by confession is binding on bondsmen.....	1315
delay in enforcing the, may not release sureties.....	1333
in replevin, effect of, in suit on bond.....	1363
is held in abeyance by an appeal.....	1247

See VERDICT.

	SECTION.
JUDICIAL SALE, when it will support replevin.....	123
JURAT may be added by amendment.....	572
JURISDICTION in replevin depends upon affidavit.....	529
of courts over judgment entry.....	1094
of inferior courts, limits on.....	1095
conflict of, between courts.....	709
<i>See CUSTODY.</i>	
JURISDICTIONAL DEFECTS not cured by amendment.....	578
JUSTIFICATION,	
under a writ as a defense.....	803-7
under writ, proper averments of.....	757
burden of proof.....	758

K.

KEEPSAKES, rule of damages in replevin of.....	903
--	-----

L.

LABORER, who has a lien may replevy from the owner	157
LABORER'S lien protected from replevin by owner.....	158
LAND. <i>See REAL ESTATE.</i>	
LANDLORD'S right to replevy for rent.....	28-36
cannot bring replevin to enforce a lien.....	116
right to fixtures, rule.....	367
can replevy property illegally severed by tenant.....	384
lien must be discharged before replevin by mortgagee.....	522
LAND UNOCCUPIED, owner may replevy trees cut on.....	388
LEASE may be replevied	76
LEGAL FICTIONS not allowed in replevin	22
LEGISLATURE may bar the right by replevin.....	322
LESSOR cannot replevy during the time of the lease.....	51
LICENSE to cut trees, how far good defense to replevin by owner,	122
LICENSOR may replevy where terms of license violated.....	380
LIEN,	
a lien holder may replevy.....	54, 157, 164
without possession, not good.....	121
the extent and validity of, are questions for the jury	62
statutory, not acquired unless law complied with fully	470
wrongdoer does not acquire	469
voluntary payment of, not recoverable in replevin.....	936
recoverable in damages.....	953-4
officer's protected where replevin tried before the attach- ment.....	963
of salvor protected.....	1115
for advances good.....	104

LIEN—Continued.

SECTION.

should be alleged specially in answer in replevin.....	779
of distrainor.....	350-1
must be discharged before replevin will lie.....	201
must be discharged before replevin lies, when	521-4
amount of must be tendered before replevin.....	218
tender to discharge. Instruction.....	1048
of bailee must be discharged before bailor can replevy....	218
replevin will not lie against one having a.....	51
LIENHOLDER may intervene when.....	444
LIENOR must have had possession.....	159
LIFE INSURANCE POLICY may be replevied.....	74
LIMITATIONS, STATUTE OF , applies to replevin bond.....	1299
LIVE ANIMALS , rule as to increase of.....	397-8
LIVERY STABLE KEEPER may replevy to enforce lien.....	157
LIQUORS ,	
seized may be replevied to test law.....	313
seized in condemnation proceedings cannot be replevied..	316
LOGS ,	
cut from sold land repleviable by vendee not by vendor...	379
where nothing paid for the land owner may replevy.....	380
LOST BOND ,	
how sued on.....	1306
replevin, damages for.....	639
LOST GOODS ,	
demand necessary for.....	471
replevied, plaintiff liable for.....	724
LOST PROPERTY ,	
rule as to.....	163-5
effect on damages where destroyed or.....	872

M.

MALICIOUS bringing of replevin, damages for.....	1394
MANDAMUS allowed to compel proper entry of judgment....	1093, 1208
MARKETS OVERT ,	
unknown to our law.....	420
purchase in, not a defense.....	834
MARKET VALUE , what is highest.....	942
MARRIED WOMAN ,	
may bring the action.....	154, 426
may replevy from husband.....	155
<i>See WIFE.</i>	
MARSHAL . <i>See</i> U. S. MARSHAL AND OFFICER.	
MASS , part of property in, may be replevied, when	400-2
MERGER , judgment in replevin is a.....	1164

	SECTION.
MINORITY of one signer to bond does not release others.....	1293
MISNOMER,	
in writ, how cured.....	628
in bond, how sued.....	1279
MIXTURE of goods.....	204-5, 399-409
<i>See</i> COMMINGLED PROPERTY, CONFUSION OF GOODS.	
MONEY, not subject to replevin	72
MORTGAGE,	
history, Mosaic law	171
distinction between, and pledge.....	184
an agreement to mortgage will not support replevin	198
equitable mortgage will not support replevin.....	199
distinction between, on crop planted and on one to be planted.....	203
right of an assignee of the mortgagor.....	178
good in one state will sustain replevin in another.....	190
rights of officer levying on mortgaged property.....	193
the effect of a levy is to create an equitable lien	194
effect of levy the same as default in payment.....	198
given under duress will not support replevin	200
after condition broken and demand, replevin lies.....	173
where illegal demand not necessary.....	494
rule of damages in action founded on.....	185
proper judgment in replevin of mortgaged goods.....	195
part payment by mortgagor does not defeat replevin.....	183
alone when not sufficient proof of title.....	206
lien of, and tender to discharge—Instructions	1048
rule in case of commingled property.....	204-5
on land, covers crop not severed	357
MORTGAGEE,	
of land not entitled to crop severed before he took posses- sion	360
that he has been summoned as garnishee, no ground for replevin against.....	196
may replevy from an officer, when.....	193-4
must make demand from an officer.....	488
cannot replevy from officer attaching, when.....	196-7
may bring against widow of mortgagor.....	175
damages in action against an officer.....	953-6
right to replevin by, depends upon statute.....	172
partial breach, no ground for replevin.....	177
effect of breach after suit commenced.....	176
may replevy—	
entitled to replevy, when	187-91
even after he has sold	188
after he has had possession	189

MORTGAGEE—Continued.

May replevy—Continued.	
after condition broken.....	189
from one interfering with his rights	191
threat to interfere is no ground for.....	192
of land may replevy house removed	362
must first discharge lien for keeping of stock	201
of tenant must pay landlord's lien for rent to replevy.....	522
may follow to another state.....	190, 209
right of replevin between different mortgagees.....	202
demand must be made by a.....	174
must demand to replevy before default	198
should make demand on mortgagor, when.....	491
proper judgment in case of replevin by.....	195
may recover total injury to property where malice	956
can usually only recover the amount of his claim.....	955
fraud is a good answer to replevin by a.....	772
MORTGAGEE AND MORTGAGOR, measure of recovery on	
bond in suit between.....	1354
MORTGAGOR,	
cannot replevy from mortgagee generally	179
but if not in default, can replevy from mortgagee	180
interest of a, may be levied on.....	194
to replevy back, must make demand.....	493

N.

NEGATIVE AVERMENTS, need not be proved under general de-	
nial.....	754, 982
NEGLIGENCE, party guilty of contributory, not entitled to	
damages.....	931
NOMINAL DAMAGES,	
an incident of success in replevin.....	949
how affected by demand.....	951
only, can be given in absence of actual damage.....	950
NON CEPIT,	
cannot be pleaded for <i>non detinet</i>	744
verdict under	1071
result in case of success on.....	949
NON CEPIT AND NON DETINET,	
little used, now	738
plea of, admits what	739-40
issue raised by <i>non detinet</i>	743
special matter cannot be shown under	742
proper judgment on.....	1146
verdict on	1051
effect of judgment in	1160-1

	SECTION.
NON COMPOS MENTIS may replevy, how.....	427
NON DETINET, evidence under.....	1004
NON EST FACTUM, a good defense to suit on bond.....	1285
NON OMITTAS, writ of.....	605
NONSUIT. <i>See</i> DISMISSAL.....	1192-1217
at common law, did not bar another suit.....	1192
on a, judgment cannot be greater than interest shown....	1207
judgment of return should be rendered on a.....	1206
on a judgment of, court may be compelled to enter proper judgment.....	1208
damages on a.....	860
is a breach of the bond.....	1256
NON TENURE, proper plea in an avowry.....	734
NOTE,	
of hand may be replevied.....	69
measure of damages in replevin of.....	900
NOT GUILTY, proper plea to replevin. <i>See</i> ANSWER.....	745
NOTICE,	
what, is equivalent to demand.....	485
what necessary before replevin of exempt property.....	500
NUNC PRO TUNC,	
amendment when allowed.....	572
correction of judgment.....	1090
O.	
OFFICER,	
as custodian may replevy official papers or books.....	423
possession after levy will support replevin by.....	110
may replevy from another officer or from a receptor.....	168
what is a proper answer by an, in replevin.....	762
<i>See</i> SHERIFF.	
OFFICIAL character may be shown under a general denial.....	756
OFF-SET,	
how far allowed in replevin.....	515
may be pleaded against the damages.....	795
<i>See</i> SET-OFF.	
OTHER THAN DEFENDANT, defined.....	169
OVER-PAYMENT, not good as an answer in replevin.....	773
<i>See</i> ANSWER.	
OWNER,	
may retake his goods peaceably at any time.....	304
may replevy from purchaser at sheriff's sale, when.....	301-2
may replevy against a stranger.....	162
should move to reclaim his property promptly.....	395
of land can replevy property severed from, when.....	378
may replevy property illegally severed.....	384
<i>See</i> CLAIMANT.	

INDEX.

913

OWNERSHIP,

SECTION.

defined as a right of possession merely.....	533
alone will not support replevin.....	91

P.

PARISH, a, may replevy its property.....	423
PARISH RECORDS may be replevied.....	78

PARTIES,

to replevin action, who are proper.....	423-46
an execution or attachment defendant not a proper.....	437
new cannot be added by amendment, when.....	579
one partner cannot replevy from another.....	69
vendee and not vendor of land should replevy crop severed	379
proper, to suit on bond.....	1294-1306

See BOND, parties to suit on.

See PLAINTIFF, DEFENDANT.

PARTNER.....	219-43
--------------	--------

cannot replevy from copartner.....	219
one may replevy from officer seizing the whole for debt of the other.....	222
may join with co-partner to replevy from officer, when...	223
one, entitled to exclusive possession may replevy from co-partner.....	224
purchaser from one, cannot replevy from the other.....	226
measure of recovery on bond in replevin between.....	1353

See JOINT OWNERS, TENANTS IN COMMON.

PARTNERSHIP,

what is a.....	220
accounts cannot be settled by replevin.....	224

PAUPER cannot prosecute replevin without bond.....	666
--	-----

PAYMENT as a plea.....	773
------------------------	-----

PERSON, articles cannot be taken from the, by replevin.....	649
---	-----

PERSONAL PROPERTY,

may become part of the realty.....	382
attached to land by a trespasser passes with it.....	383
attached to land without consent may be replevied	372

See GOODS, HOUSES, TREES, FIXTURES, CROPS.

PETITION.....	525-603
---------------	---------

what it should contain.....	593
proper allegations of.....	598-600
may claim property held by different titles.....	565
redundant or irrelevant matter may be stricken out of ...	566
plaintiff bound by allegations therein.....	601
must be construed as a whole.....	602

See AFFIDAVIT, COMPLAINT, DECLARATION, PLAINTIFF.

PLAINTIFF,

SECTION.

proper.....	423-46
generally, any one may be.....	423
must have an interest in the property to be a.....	132
right of, must be clear at commencement of action.....	257
must recover on strength of his own title.....	99
examples of who may be.....	423-4
married woman may be.....	426
<i>non compos</i> , may be by next friend.....	427
school district may be.....	137
state or United States may be.....	140
one having right to use property a proper.....	142
one who has lost possession wrongfully a proper.....	145
one having a special right to possession may be a.....	144
an assignee of a right to replevy may be a.....	428
interest of a, need not be particularly alleged.....	555
joint owners must join as	429-30
several creditors of one debtor may join as.....	138
cannot take inconsistent positions.....	559
may replevy property held by different titles in one action	565
must stand or fall on title alleged in petition.....	601
in replevin not protected by the writ from damage caused by.....	646
entitled to custody of the property while suit pending.....	712
responsible for injury to goods while in his possession.....	723
in replevin should not sell the property pending the suit..	721-2
in replevin must show title against the world.....	784
cannot dismiss replevin action.....	1193-9
measure of damages in favor of.....	863-4
rule of damages if he succeed.....	852-5
a substituted, may sue on the bond.....	1301
change of, does not release bond.....	1331

See PARTIES.

PLEADING,

plaintiff cannot take inconsistent positions.....	559
special damages must be specially pleaded.....	603
damages for use need not be specially pleaded.....	892
waives prior defects.....	726-7
may be amended to show change in value.....	911
may be amended even after judgment.....	1239

See AFFIDAVIT, ANSWER, REPLY.PLEAS: *See* ANSWER.

PLEDGE, distinction between, and mortgage..... 184

PLEDGE,EE,

may bring the action.....	152
not entitled to value of use as damages.....	895

	SECTION,
PLEDGE— <i>Continued.</i>	
but may have value of use against a wrongdoer.....	896
<i>See</i> BAILOR AND BAILEE.	
PLURIES WRIT	606
when issued in some states.....	629
<i>See</i> WRIT.	
POSSESSION,	
when good title.....	136
only <i>prima facie</i> title.....	131
alone good ground for replevin, when.....	84-5
right to, alone sufficient to support replevin.....	134
is <i>prima facie</i> ownership.....	1017
alone good against a trespasser.....	93
is a question for the jury.....	62
right to, must continue to close of suit.....	97
right of at former time not in issue.....	98
what is, by officer.....	62
is necessary to sustain a lien	159
acquired in good faith demand necessary before replevin..	472
POSSESSOR of a stray may replevy.....	109
POUND-MASTER,	
may replevy stock illegally removed from pound.....	157
POWDER, condemned, may be replevied to test law.....	315
PRACTICE in replevin in England.....	7
PRETIUM AFFECTIONIS, rule of damages in case of	903
PRIVIES bound by judgment in replevin.....	1169
PROFITS,	
prospective, not an element of damage.....	972-4
probable, when allowed.....	974
PROOF,	
all facts forming part of the <i>res gestæ</i> admissible.....	25
<i>See</i> EVIDENCE.	
PROPERTY,	
in custody of the law.....	299-332
changed in form.....	390
<i>See</i> GOODS CHANGED IN FORM.	
commingled.....	399-409
<i>See</i> COMMINGLED GOODS.	
custody of pending suit.....	704-25
<i>See</i> CUSTODY.	
exchanged for stolen or bartered, rule as to.....	417-18
cannot be taken from person by replevin.....	83
<i>See</i> GOODS.	
PUBLIC FILES not the subject of replevin, except by custodian,	75
PUNITIVE DAMAGES.....	924
meaning of the term.....	926

	SECTION.
PUNITIVE DAMAGES — <i>Continued.</i>	
largely in the discretion of the jury.....	929-30
<i>See DAMAGES. EXEMPLARY, VINDICTIVE.</i>	
PURCHASER AT SHERIFF'S SALE may replevy his purchase,	509
a, of personal property must tender bid and demand.....	508
a, when not protected.....	256
a, at sheriff's sale, not protected from replevin by owner..	303
a, of one partner's interest can replevy from a stranger...	228
Q.	
QUESTIONS ARISING,	
in preparing to commence an action in replevin (Part I.),	1-524
in the prosecution and defense of an action in replevin	
(Part II.)	525-1249
in the prosecution and defense of an action on the replevin	
bond (Part III.).....	1250-1394
R.	
RAILROAD. <i>See CARRIER.</i>	
REAL ESTATE,	
unoccupied, owner may replevy trees cut on.....	389
owner of may replevy house removed from.....	362
when articles may be severed from by sheriff.....	650
damage in case of property severed from.....	906-7
the title to cannot be determined in replevin.....	56, 83
how far title to involved in replevin.....	375-6
how far title to considered.....	1023
what are fixtures	366-71
REAL PROPERTY, things which may be either, or personal.....	353-88
<i>See CROPS.</i>	
RECAPTION	1218-35
when allowed.....	1231
<i>See CROSS-REPLEVINS, SECOND REPLEVINS.</i>	
RECEIPTOR,	
of sheriff may replevy from one interfering with his right,	423
of property may maintain the action.....	166-7
RECEIVER, duties and rights of, in replevin.....	319-21
RECOUPMENT not allowed in replevin	791
REDELIVERY BOND	1357
giving of, waives what defenses.....	701
waives defects in affidavit.....	728
does not affect title.....	715
entitles defendant to custody of the property	714-15
where given, rule of damages.....	852
<i>See BOND.</i>	

INDEX.

917

SECTION.

REDUNDANT MATTER, may be stricken out of petition.....	566
REFUSAL,	
to deliver on demand, effect of.....	474
to comply with demand is a proper—Date to fix value....	937
REINSTATEMENT,	
of dismissed action only made on strong grounds.....	1204
<i>See</i> DISMISSAL AND NONSUIT.	
RELEASE a good defense to suit on bond.....	1375
REMOVAL, replevin action may be removed to Federal court....	331
REPLEVIN,	
historical	1
one of the earliest writs known.....	1
its origin lost in antiquity.....	1
first appearance as part of the <i>Lex Scripta</i> in 1267	1
was developed in the struggle between the common people	
and the barons.....	1
action may be transformed into equitable or other action,	1
may be used to try title as well as right of possession.....	1
is the most important form of action known to our law,	1
derivation and definition.....	2
etymology	2
is a writ of justice.....	3
is a mode of redress for the loss of goods.....	4
both parties are actors.....	4
practice in, in England	7
the old forms not known here.....	8
but are still recognized, though not in name.....	9
in the <i>cepit</i> , issue	8, 10
in the <i>detinet</i>	8
in the <i>detinue</i>	8
may be extended or limited by statute	11
the gist of the action.....	12
is not an extraordinary remedy like attachment.....	13
it is not in derogation of the common law.....	13
the action cannot be enjoined.....	14
law governing, should be construed liberally	15
strictly a law action	16
right of action must exist when suit commenced.....	16
an after-acquired interest will not support.....	96
distinction between trespass, trover, and replevin.....	17
similarity of trespass, trover, and replevin.....	18
the proper remedy to recover chattels.....	19
its importance.....	20
its development.....	20
its peculiarities	20
is a mixed action	21

REPLEVIN—*Continued.*

SECTION.

how far an action <i>in rem</i>	21
and how far <i>in personam</i>	21
governed by same rules as trover, when	21
founded on a tortious taking and detention	22
objects two—	
primary	23
secondary	24
scope of the investigation in replevin	25
cannot be turned into an action to quiet title	26
scope of the action	26, 27
is strictly a possessory action	27, 64
as between landlord and tenant	28-35
does not lie against one not in possession	63-4
will lie against whom	58
does not take the place of trover, <i>detinue</i> , or case	67
when the proper form of action	68
merely suspends prior levy of an execution	720
courts should give the action such flexibility as to do full justice to both parties	794
cannot be prosecuted without bond	666-7
effect of, on property	704
rule of, between different officers	964
how far title to land involved in	374-8
action may be removed to Federal court	331
where brought	327
may be brought in any court of competent jurisdiction ..	329
property illegally seized, replevable in any court	326-7
removal of the property does not affect jurisdiction	328
from United States marshal	324-6
property held in, cannot be seized on other process	708
right to, may be barred by legislature	322
who may maintain	132-70
one entitled to possession may follow the property to a foreign state and replevy	190
may be brought by state or United States	404
right not limited to the general owner	134
distinction between "stranger" and general owner	95
by partner, joint owner, or tenant in common	219-43
<i>See</i> PARTNER, JOINT OWNER, AND TENANT IN COMMON.	
by agent, bailor, and bailee	207-18
<i>See</i> AGENT.	
rule between mortgagor and mortgagee	171-97
<i>See</i> MORTGAGOR, ETC.	
by mortgagee of unplanted crops, when allowed	203
mortgagee may bring after sale, when	188

REPLEVIN—*Continued.*

an agreement to mortgage no ground for replevin.....	199
between vendor and vendee.....	244-89
<i>See VENDOR.</i>	
fraud by vendee ground of replevin.....	262
what property may be replevied.....	69-83
what may be replevied.....	299-332
<i>See GOODS IN CUSTODY OF LAW.</i>	
only lies for property <i>in esse</i>	82
property cannot be taken from the person.....	83
property must be capable of actual seizure.....	83
can only be brought for certain specific articles.....	73
right to, not effected by change in form.....	392
commingled property when replevied.....	204, 399-409
<i>See GOODS.</i>	
exempt property may be.....	332
<i>See EXEMPT PROPERTY.</i>	
property seized for tax cannot be.....	333-47
<i>See TAX.</i>	
will lie where tax is void.....	338
of impounded animals.....	348-52
<i>See DISTRAINT AND IMPOUNDED ANIMALS.</i>	
rule as to increase of live animals.....	397-8
lies for chattels severed from the freehold.....	56
will not lie for property legally held under process.....	52
will not lie where plaintiff has a conditional right only....	55
lies for property in hands of a receptor.....	59
parties in, who are proper.....	423-46
<i>See PARTIES.</i>	
action of must be brought by real party, in interest.....	425
right to bring the action may be assigned.....	428
lies against one having legal title unless he disclaims.....	434
against an officer, when allowed.....	193-4
does not lie against an officer holding under special law..	158
will not lie against one not in possession.....	192
will not lie where defendant never has been in possession..	132
may be brought by other than real party in interest,	
when.....	187
who cannot maintain replevin.....	146-9
when it lies generally.....	51-68
at common law there must have been an unlawful taking,	
always lies where there is an illegal taking.....	52
now may be used whenever one claims property in posses-	
sion of another.....	530
will lie where trover would lie.....	54
what circumstances will support the action.....	58

	SECTION.
REPLEVIN—Continued.	
will not lie, when	52
will not lie where the result is to deprive a part owner of possession	240
what title will support the action.....	26, 84-131
equitable title alone will not support.....	60
REPLY.....	837-43
seldom necessary in replevin.....	837
necessary in case of an avowry.....	838
not necessary to a general denial.....	839
answer of property in a third person does not need a.....	840-1
requisites and sufficiency of.....	843
RES ADJUDICATA.....	305
issues tried in a replevin action are.....	1221
RESCISSION OF CONTRACT, rule in.....	418
<i>See VENDOR AND VENDEE.</i>	
RES GESTÆ.....	984-7
RESTITUTION.....	1111-33
<i>See RETURN, JUDGMENT.</i>	
RETORNO HABENDO	1179
RETURN,	
to writ, how and when made	658-9
to writ part of the record	660
may be amended to truly state the fact.....	663
cannot be impeached by sheriff.....	662
conclusive between parties.....	661
when writ of replevin should be returned by officer	616
of property, rules governing.....	1111-33
judgment for, necessary when.....	1111
judgment of, proper in favor of an officer.....	1137-40
of property under judgment of, what is a good.....	1179-91
ordered or not, in discretion of court.....	1181
of property should be made by the officer taking same....	1180
what constitutes, of the property.....	1184-5
order of, duty of party in possession to make at once.....	1182
should be to the same custody whence taken.....	1183
what is a proper tender of.....	1184
what is a proper, in case of attached property.....	1185
of property levied on, should be to the officer.....	1186
where property has been changed for other.....	1187
successful party may wait until a return is tendered	1188
an actual, will alone satisfy the judgment.....	1189
tender of a, must be kept good.....	1190
effect of a, is to satisfy the judgment for.....	1191
not necessary to demand a, before suit on bond.....	1266
effect of a judgment for.....	1216

INDEX.

921

SECTION.

RETURN—*Continued.*

under order of a court, a good defense to suit on bond.....	1388-9
effect of a, after suit brought on bond.....	1391
REVENUE	333-47
collector, property seized by not subject to replevin.....	318
<i>See TAX.</i>	

REWARD for lost goods is a lien that will support the action.....	163-4
---	-------

RIGHT OF PROPERTY,

trial of.....	808
trial of is not a replevin.....	445
where, is limited by time, rule as to demand.....	480

See TRIAL OF RIGHT OF PROPERTY.

RIPARIAN OWNER, rights of.....	165
--------------------------------	-----

S.

SALE,

by sample a conditional, can be rescinded.....	252
induced by fraud, void.....	262
when rescinded, note should be tendered back	517
of property replevied by plaintiff, effect of on title.....	721-2
a judicial, of realty passes crop.....	356

See VENDOR AND VENDEE.

SALVOR'S LIEN protected	1115
-------------------------------	------

SATISFACTION good defense to suit on bond.....	1375
--	------

SCHOOL DISTRICT may replevy its house.....	137
--	-----

SCRIP, may be replevied	80
-------------------------------	----

SEAL not ordinarily necessary to bond.....	683
--	-----

SECOND REPLEVINS.....	1218-35
-----------------------	---------

defined.....	1228
not a, unless parties are identical.....	1232-4
may be brought where first is discontinued.....	1229
nonsuit in the first action not a bar to.....	1230
judgment in first action for damages only not a bar to...	1235

See CROSS-REPLEVINS, RECAPTION

SECURITY COMPANY,

money paid to for bond, not proper damages.....	922
---	-----

SERVANT,

when he may replevy.....	423
when not a proper plaintiff.....	150

SERVICE of the writ.....	632-64
--------------------------	--------

See WRIT.

SET-OFF,

over payment not recoverable.....	773
does not justify a tort.....	792
not allowed.....	791
in case of a chattel mortgage.....	793

SET-OFF—*Continued.*

SECTION.

when proper in replevin.....	736
may be pleaded against the damages.....	795
allowed in suit on bond.....	1383

SHERIFF,

duty under writ of replevin.....	632
should seize the property first.....	633
authority of, under the writ of replevin	632-64

See WRIT, SERVICE OF.

should take bond; is liable for failure to do so.....	638
liable for loss of replevin bond taken by him	639
sole judge of sufficiency of bond in the first instance.....	678-9
liable for not taking proper bond.....	686
liable for custody of property before bond given.....	711
where parties agree on a keeper is not responsible for property after delivery to the keeper	690
may levy on a mortgagor's interest.....	194
when liable to replevin by mortgagee	193-4
entitled to demand from a mortgagee.....	488, 490
damages against in case of mortgaged property.....	953-8
when entitled to demand.....	497, 499
may levy on a bailee's interest.....	215
in taking under process only protected from replevin, when	300
not protected unless he act strictly within his writ.....	466
mere irregularities by, no ground of replevin from him....	305
is a proper party defendant after levy of process.....	436-7
where he is defendant in replevin he cannot dismiss action,	439
when his valuation is evidence against him.....	962
right of possession limited.....	635
what is constructive possession by a.....	636
where a party, writ directed to coroner.....	614
where replevin tried before the attachment suits his lien will be protected by the court.....	963
cannot take property from United States marshal.....	964
may replevy goods seized by him.....	423
a receiptor cannot set up title against sheriff.....	217
taking under a writ, measure of damages against.....	967
seldom liable for more than actual damage.....	933
when entitled to a return.....	1137-40
takes no right by levy where defendant guilty of fraud....	503
can only recover the amount justly due on writs.....	960
wrongfully dispossessed, damage, value of writ and interest	959
as against an intruder entitled to full value.....	965
not entitled to value of use as damages.....	895
but may have value of use against a wrongdoer.....	896
should take and deliver property when a return ordered..	1180

SECTION.

SHERIFF—*Continued.*

liable on bond for judgment in replevin, when.....	1172
suit by use of bond in name of.....	1296
suit on bond by for use, etc.....	1295
SIGNATURE may be added by amendment, to affidavit.....	572
SILSBURY V. McCOON,	
rule in, when property changed in form.....	\$ 909, pp. 488-493
SISTER STATES,	
proceedings in, respected.....	717
officers of, will be respected.....	320
SOUVENIRS, rule of damages in replevin of.....	903
SPECIAL LEGACIES, not repleviable by administrator.....	151
SPECIAL OWNER. <i>See</i> BAILOR AND BAILEE.	
SPECIAL OWNERSHIP, measure of damages in case of.....	971
SPECIAL PROPERTY RIGHT,	
will support replevin.....	86, 101, 102, 132, 133
when not sufficient.....	115
SPECULATIVE DAMAGES, not allowed in absence of malice.....	927-8
<i>See</i> EXEMPLARY, VINDICTIVE.	
STATE may replevy.....	423
STATEMENT OF ACCOUNTS may be replevied.....	69
STATUS OF PROPERTY taken in replevin.....	705
<i>See</i> CUSTODY.	
STATUTE OF FRAUDS will not support replevin.....	118
STATUTORY REPLEVIN to be construed liberally.....	1
STIPULATION as to damages will be enforced by the court.....	1150
STOCK OF CORPORATION,	
may be replevied.....	77
measure of damages in replevin of.....	901
STOLEN GOODS.....	410-22
<i>See</i> THEFT, FRAUD.	
STOPPAGE IN TRANSITU,	
when allowed.....	255
<i>See</i> CARRIER.	
STRANGER,	
rights of, in replevin.....	95
defined.....	170
a, cannot maintain.....	148
a, to the execution or attachment may replevy.....	301
to first replevin may replevy.....	1233-4
property may be taken from a, by replevin.....	652
to the title, liable for full value, when.....	968-9
title in a, when a defense.....	785-7
STRAY ANIMALS, when taker up has a lien.....	470
SUBROGATION, sureties on bond are entitled to.....	1336
SUBSTITUTED DEFENDANTS.....	444-6

	SECTION.
SUBSTITUTED DEFENDANTS— <i>Continued.</i>	
proper judgment against.....	1152
<i>See</i> DEFENDANTS.	
SUBSTITUTED PROPERTY,	
when it may be replevied.....	393
property substituted by agreement is repleviable.....	394
SUBSTITUTION OF SURETY on bond as plaintiff, when.....	1154
SUNDAY,	
replevin writ cannot be served on.....	651
verdict may be returned on.....	1079
SURETY ON BOND in replevin.....	682
how regarded by courts.....	1308
liability not greater than principals.....	1309
released by discharge of principal.....	1310
must be a judgment against their principal.....	1311
waiver of a judgment against principal, a release.....	1312
cannot contradict judgment against principal.....	1313
bound by the judgment in replevin.....	1314
not bound by fraudulent judgment.....	1316
judgment entered against in replevin action, when.....	1317
obligation of, not enlarged by courts.....	1318
liability not changed without consent.....	1319
liability determined by law in force at time they signed....	1320
only covers ordinary result in legal proceeding.....	1321
not liable for prior matters not included in judgment.....	1326
not bound by subsequent loss of property.....	1322-3
released by a legal disposition of the property.....	1324
extent of their liability.....	1325
effect of compromise with a part.....	1327
bound by the final result, not by first trial.....	1328
not released—	
on frivolous pretext.....	1329
by change in plaintiff.....	1331
by change of defendants.....	1332
by some delay in enforcing judgment.....	1333
by discharge in bankruptcy of principal.....	1334
who pay the judgment entitled to the property.....	1337
who voluntarily pays cannot recover from principal.....	1335
cannot control the custody of the property.....	725
cannot contradict recitals of bond.....	1330
will be allowed to prosecute suit, when.....	1154
cannot replevy the same property.....	126
contribution and subrogation by.....	1336
on stay bond cannot replevy.....	146
<i>See</i> BOND.	
SWAMP LAND, owner may replevy trees cut thereon.....	388
SYMBOLICAL DELIVERY, sufficient to support replevin.....	113

T.

	SECTION.
TAKER UP OF A STRAY, may replevy.....	102
TAX,	
property seized for, cannot be replevied.....	333-47
property taken for, cannot be replevied.....	52, 534
errors in assessment not ground for replevin.....	334
illegality of, no ground for replevin.....	336
excessive, double, or erroneous, not ground of replevin...	337
legality of the corporation taxing not triable in replevin.	346
timber on land sold for taxes cannot be replevied.....	355
where A's goods taken on warrant for B's tax, A may re-	
plevy.....	340
a purchaser at tax sale not thus protected.....	341-2
warrant, possession under, a good defense to replevin	818
warrant must be regular on its face and issued by author-	
ity or it is no protection.....	335
warrant must be executed by authorized officer.....	346
officer seizing for, outside of his jurisdiction, replevin will	
lie.....	345
replevin lies where, is void.....	338
replevin will not lie if part is valid, though part invalid,	
owner may tender the legal tax and bring replevin.....	339
payment after seizure, no ground of replevin.....	344
replevin the only remedy prohibited, officer liable in dam-	
ages for illegal seizure.....	343
.....	347
TEMPORARY RIGHT to possession will support replevin	111
TENANCY IN COMMON, may be created by mixture of goods....	408
TENANT,	
right to replevy from landlord.....	28-50
cannot replevy from a co-tenant.....	117
TENANTS IN COMMON.....	219-43
one cannot replevy from another.....	219
what constitutes.....	220
when, cannot replevy.....	31
cannot replevy from officer, when.....	229
<i>See PARTNERS AND JOINT OWNERS.</i>	
TENDER,	
when amount of lien must be tendered by owner.....	159
of amount of a lien ends the action by a lienor.....	160
back should be made of note taken in payment, when.....	517
when not necessary to be made to a common carrier.....	515-16
of proper amount to carrier necessary, when.....	516
a, must be unconditional.....	518
a refusal to accept a, must also be unconditional	519
of amount of lien—Instructions on.....	1048

	SECTION.
TENDER TO DISCHARGE LIEN.....	514-24
must be before suit brought.....	514
<i>See DEMAND.</i>	
THEFT.....	410-22
distinction between, and fraud.....	416
owner may replevy stolen goods wherever found.....	410
property traded for that stolen when repleviable.....	417
<i>See FRAUD.</i>	
THIEF,	
stolen goods need not be demanded of a.....	455, 463
ratification of purchase from, not inferred by lapse of time.....	412
innocent purchaser from a, may replevy back	411
purchaser from a, cannot replevy from the true owner.....	422
TIMBER. <i>See CROP.</i>	
TITLE,	
to real property cannot be quieted by replevin.....	83
to real estate how far involved.....	375-6
to real estate cannot be tried in replevin.....	69
required to support replevin the same as in trover.....	89
<i>prima facie</i> title is better than possession alone.....	92
paramount, not necessary, when.....	93
right to possession indispensable	94
naked possession alone good, when.....	60
without right of possession, not good.....	128, 130
possession alone good against a wrongdoer.....	89
a qualified, when good.....	99
in members of voluntary organization sufficient.....	114
where plaintiff has conveyed away his title he is estopped	125
under a writ may be shown, when.....	755, 757
based on judicial sale, when sufficient.....	123
based on license, when sufficient.....	122
by symbolical delivery sufficient.....	113
the better will prevail in replevin.....	88
equitable alone will not support replevin.....	60, 100
from a trespasser confers no right.....	161
based on statute of frauds will not support.....	118
based on immoral contract will not support.....	149
by gift not good.....	119
based on promise by infant not sufficient.....	120
based on unexecuted contract not good.....	124
does not pass until terms of sale are fulfilled and vendor may replevy.....	249
reserved, seller may replevy.....	106, 112
to half interest not sufficient.....	127
in a third party when available as a defense.....	785-7

TITLE—*Continued.*

not affected by bond in replevin.....	702-3
pending suit, effect of redelivery bond.....	715
not affected unless strictly in issue.....	1168
is vested in defeated party by payment of money judgment	1174
TITLE DEED may be replevied.....	70, 79
TORT,	
cannot be justified by a set-off.....	792
where, committed in taking property, no demand necessary	463
TRADE FIXTURES. <i>See</i> FIXTURES.	
TREASURE TROVE.....	164
TREES,	
may be real or personal property.....	353
while standing are realty, but not when severed	375
severed by mistake repleviable by true owner.....	386
severed by adverse claimant not repleviable.....	374
<i>See</i> CROPS.	
TRESPASS,	
differs from replevin in what.....	17
similarity to replevin.....	18
rule of damages in, a guide in replevin.....	925
officer not liable for, in serving writ in replevin.....	644
action in, not barred by replevin action.....	1166
TRESPASSER,	
changing value of goods taken.....	390
<i>See</i> GOODS CHANGED IN FORM.	
willful, not entitled to damages.....	908
TRIAL OF RIGHT OF PROPERTY.....	808
defeated claimant cannot replevy.....	1220
cannot be turned into replevin.....	445
<i>See</i> RIGHT OF PROPERTY.	
TROVER,	
differs from replevin.....	17
supposes a casual loss and finding.....	18
similarity to replevin.....	18
rules in, applicable in replevin.....	21
rule in, a guide as to value in replevin.....	945
will not lie against officer in replevin.....	645
barred by a former judgment in replevin.....	1166
TRUSTEE,	
may maintain the action.....	169
a, may replevy.....	424
a, after default need not demand.....	492
not personally liable in replevin.....	1173
<i>See</i> BAILOR AND BAILEE.	

U.

	SECTION.
UNCONSTITUTIONAL LAW, property taken under repleviable	313
UNDERVALUATION, sheriff responsible for.....	687-8
UNDIVIDED INTEREST,	
cannot be replevied.....	238
in property separable into aliquot parts may be replevied,	238
UNEXECUTED CONTRACT will not support replevin	124
UNITED STATES may replevy its property.....	404
UNITED STATES COURT or officer cannot seize property replevied in state court.....	709
UNITED STATES MARSHAL,	
replevin from	324
not protected where he proceeds illegally.....	325
property cannot be taken from by state court.....	934
cannot levy on property replevied in state court.....	708
USE,	
of the property allowed in damages.....	858
cannot be recovered for in addition to value.....	961
USABLE VALUE,	
as a measure of damages.....	887-98
<i>See DAMAGES.</i>	
rule discussed in <i>Romberg v. Hughes</i>	887
USURIOUS AGREEMENT, demand not necessary to repudiate	495
USURY,	
when a good defense.....	793
as a defense should be specially pleaded.....	780

V.

VALUE,	
cannot be sued for while replevin is pending	710
rule in trover as to, a guide in replevin.....	945
always proper to show the, in replevin.....	998
verdict should find the, of each item.....	1062-3
error in, unimportant if property can be returned	1135
judgment for, only proper where return ordered.....	1134
full, allowed against a stranger to the title.....	968-9
depreciation in, a proper element of damages.....	914-18
where fixed at the place where unlawfully taken.....	944
where no market, distant market a guide to the	946
what is highest market.....	942
how and when shown.....	995-1000
fluctuating gold coin, how fixed.....	948
as of what time fixed in replevin (generally)	937
when assessed at time of trial.....	938

VALUE—*Continued.*

rule where—

property increased in, after the taking.....	912-13
it is fluctuating.....	939-40
not stable	941

VARIANCE,

between allegations and proof, fatal.....	61
between affidavit and proof, fatal.....	545
effect of a, when fatal.....	574
effect of a, between bond and petition in suit on bond.....	1281

VENDEE,

cannot enforce contract by replevin.....	289
can sell his interest and replevin will not lie.....	287
right to rescind must be exercised promptly	275
must demand of third party rightfully in possession, even in cases of fraud.....	504
possession lawful, demand must be made.....	505-7
in case of fraud by, no demand necessary.....	503
of land may replevy crops severed	379

VENDOR,

may replevy property sold, when	244-5
where sale is fraudulent, may replevy.....	245
rule where, reserves title in himself	246
where title is reserved, may replevy from an assignee.....	247
must make demand, when.....	258
need not tender back partial payments first.....	248
must return partial payments before he can rescind sale..	258
need not return part payments when impossible.....	260
must first return notes received in payment.....	257
offer to return void note not necessary	257
must at least offer to return before verdict.....	261
may replevy from United States marshal.....	249
may replevy before terms of sale fully complied with.....	249
can rescind sale before actual delivery and replevin.....	255
who reserves title until full payment may replevy from an innocent purchaser.....	256
who reserves title in himself need not demand or pay back	259
cannot replevy if sale be unconditional and no fraud.....	250
cannot replevy where he has waived conditions.....	251
can replevy from an administrator of the vendee.....	252
may restrict use to certain limits and replevy if condition violated	253
may replevy exchanged property, when.....	393
when statement of a, is evidence.....	988
evidence in cases of rescission by	278

	SECTION.
VENDOR— <i>Continued.</i>	
what circumstances justify a rescission.....	267
failure of vendee may.....	274
sale to infant may be rescinded.....	270
nonpayment alone not ground of rescission.....	271
payment stopped by garnishment not ground.....	273
fraudulent vendee takes title or not at election of vendor,	265
deceived or defrauded, may replevy.....	262-6
time when false representations made not material.....	266
honest silence as to insolvency no ground of rescission....	272
defrauded vendor must rescind at once and return consid-	
eration received.....	279
may replevy part and sue for value of part of goods sold	280
cannot prove claim under bankrupt law, and replevy too	281
may claim under assignment law and replevy too.....	282
may replevy goods levied on for debts of vendee.....	285-6
may replevy from assignee of fraudulent purchaser.....	296
can replevy from an assignee under a state law.....	290-1
replevin will not lie by, where possession is given by con-	
sent.....	276
what is wrongful detention.....	288
cannot replevy from a purchaser at execution sale.....	283
cannot replevy from purchaser of vendee, when.....	284
what acts constitute a return and rescission.....	277
note in payment should be tendered back to rescind	517
effect of rescission by.....	278
effect on third persons of a rescission by.....	279
VENDOR AND VENDEE.....	244-89
measure of damages in replevin between.....	899
VENUE, where laid in replevin.....	564
VERDICT.....	1049-85
when may be directed by court.....	1026
should respond to all the issues.....	1049, 1057-8
must speak as to unlawful detention.....	1049
must settle status of all the property.....	1056
should find value of property.....	1061
value of each item should be found if possible.....	1063
must be certain as to description.....	1066-7
must always be certain.....	1070
must find value of a partial interest.....	1072-3
should assess the damage.....	1074
construed liberally with reference to pleadings.....	1050-1
in <i>non detinet</i> and <i>non cepit</i>	1051
had under <i>non cepit</i>	1071
language of, construed to uphold, if possible.....	1052
mere informalities in, not fatal.....	1054

VERDICT—Continued.

SECTION.

may be corrected in form by court.....	1055
surplusage in, may be rejected.....	1055
a general, sufficient, when.....	1059
effect of a general finding.....	1060
court cannot fix value in, where omitted by jury.....	1062
when value may be found in gross.....	1064
defendant can not be injured by failure to find value, when.....	1065
indefinite description in, fatal.....	1067
illustrations of those upheld.....	1068
illustrations of those held bad.....	1069
court may compel finding as to damage.....	1075
may support judgment of return but not for value, when, proper, where defense is fraud.....	1076
general forms of.....	1077
may be returned on Sunday.....	1078
may be returned on a holiday.....	1079
separate defendants entitled to separate.....	1080
may be partly for defendant and partly for plaintiff.....	1081
special, may be required of the jury by either party.....	1082
distinct issues must not be united in one.....	1083
must be consistent with itself.....	1084
<i>See FINDING.</i>	
VINDICTIVE DAMAGES.....	924
meaning of term.....	926
largely in the discretion of the jury.....	929-30
in case of insult or malice.....	920-1
<i>See DAMAGES.</i>	
seldom given against an officer.....	933
not allowed in suit on bond.....	1341
<i>See EXEMPLARY, PUNITIVE, AND DAMAGES.</i>	
VOLUNTARY ORGANIZATIONS, rights of.....	114
VOLUNTARY PAYMENT,	
not recoverable back in replevin.....	936
by surety on bond cannot be recovered from principal.....	1335
VOLUNTARY SURRENDER of property waives lien.....	159
VOUCHERS may be replevied.....	70

W.

WARRANT for money may be replevied.....	81
WHO MAY MAINTAIN REPLEVIN.....	132-70
WHO MAY REPLEVY,	
real party in interest the proper plaintiff.....	186-89
one not entitled to possession cannot.....	52
an assignee of note may, for mortgaged property.....	186

	SECTION.
WHO MAY REPLEVY— <i>Continued.</i>	
a receptor of goods may.....	57
<i>See</i> PLAINTIFF.	
WIFE,	
can replevy, when.....	426
may replevy her own property.....	154-5
<i>See</i> MARRIED WOMAN.	
WILD ANIMALS may be replevied.....	70
WITHERNAM, writ of.....	609
WRIT,	
of <i>non omittas</i>	605
<i>alias</i> and <i>pluries</i> , use and when issued.....	606, 629
of withernam, origin and use of.....	609
WRIT OF REPLEVIN,	
a common law writ, but now a matter of statute.....	1
how issued and executed in England.....	7
its history and use.....	604-31
originally not returnable.....	604
old form of.....	604
only issued at Westminster.....	607
origin of present writ and proceedings.....	608
its issue a ministerial act.....	611
must be issued by authority.....	612
should be addressed as other writs.....	613
directed to coroner where sheriff a party.....	614
what it should contain.....	615
when returnable.....	616
should follow description in affidavit.....	617-18
description in, when sufficient.....	619
description in, may be amended when.....	620
total lack of description is fatal.....	621
need not state alleged value of property.....	622
practice where bond is filed before it issues.....	623
should run against the party in actual possession.....	624
is under control of plaintiff.....	625
taking out of, is commencement of the action.....	625
date of, not conclusive of the fact.....	626
may be amended as to value.....	627
misnomer in, how cured.....	628
new service under void writ not allowed.....	630
when part of property taken cannot arrest.....	631
does not protect the plaintiff.....	646
service of.....	665-703
<i>See</i> BOND.	
duty of sheriff under.....	632
should be served on the property first.....	633

WRIT OF REPLEVIN—*Continued.*

SECTION.

Service of—*Continued.*

service on property means actual seizure.....	634
a failure to serve defendant is cured by appearance,	637
where served on person alone proceeds as suit for	
damages	664
sheriff liable if he fail to take a good bond.....	638
if sheriff lose bond he is liable.....	639
property should be held to allow bond to be given	640
sheriff must use his best judgment in serving.....	642
sheriff must see that writ is regular on its face....	643
sheriff is protected from trespass in service of.....	644
sheriff may break and enter to serve when.....	647
sheriff with, should make his authority known....	648
sheriff cannot take property from the person.....	649
sheriff may sever articles attached to real estate..	650
sheriff may take property from stranger to writ..	652
property described in should be taken wherever	
found	652
sheriff should use a sound discretion in serving....	654
cannot be executed on Sunday.....	651
defendant not bound to assist officer in.....	655
valid service cannot be made unless a good bond	
is given.....	693
power of court to compel defendant to surrender property	656
defendant liable for hindering officer in service of.....	657
return to—	
should be made to court by sheriff in writing	658
is part of the record.....	660
is conclusive between the parties.....	661
cannot be impeached by the sheriff.....	662
may be amended to state the facts.....	663
is evidence of defendant's possession.....	990

WRITTEN INSTRUMENTS, copies need not be set out in affidavit 546

WRONGDOER,

not entitled to demand.....	467
several need not be joined as defendants.....	442
adding to value of goods, cannot keep added value	390
<i>See GOODS CHANGED IN FORM.</i>	
cannot recover what he has added to the property.....	947

Y.

YOUNG OF ANIMALS, rule as to replevin of..... 397-8

KF 720 C65

Author	Cobbey, Joseph Elliot	Vol.
Title	A practical treatise on the law of replevin	Copy
Date	Borrower's Name	

